No. 80-264

In the Supreme Court of the United States

OCTOBER TERM, 1980

ELMER B. STAATS, Comptroller General of the United States,

and

UNITED STATES OF AMERICA, PETITIONERS

v.

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

Petition for writ of certiorari filed August 21, 1980.
Certiorari granted December 8, 1980

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United States District Court, Southern District of New York

STAATS. VS. BRISIES DIVISION OF BRISTOL-MYERS COMPANY Vs. STAATS, U.S.

75 Civ 1334 JUDGE LASKER

DATE	NR.	PROCEEDINGS
		Page #2
03-18-75	1	Filed Complaint and Issued Summons.
4-7-75	2	Filed Summons with Marshal's return. Served: Elmer B. Staats Comp. Gen of US Wash. D.C. by Certified Mail Receipt #161650 dated 3-19-25 U.S. Atty Gen. Wash. D.C. by Certified Mail Receipt #161651 dated 3-19-75 U.S. Atty Office Foley Sq. by P. Trior on 3-19-75.
5-20-75	3	Filed Deft.'s Answers.
5-28-75	4	Filed U.S. Atty's Notice of Motion for an order granting leave to the USA to intervene . . . . . ret. 6-11-75 at 10am rm 2903.
5-28-75	5	Filed U.S. Atty's Memo of Law in support of its motion to intervene.
6-24-75	6	Filed Consent Order that the U.S.A. may intervene as a party deft in this action and that the U.S.A. is directed to file its pleading within 10 days of the signing of this order . . . . Lasker, J. mn
6-30-75	7	Filed Memo-End on back of motion filed 5-28-75 . . . . Motion granted in accordance with consent order of 6-24-75 . . . It is so ordered . . . . Lasker, J. mn
6-30-75	8	Filed Deft's Objections to pltff's 1st Set of interrogs.
6-30-75	9	Filed Deft's Answers to pltff's 1st set of interrogs.
7-3-75	10	Filed ANSWER to complt by Intervenor (U.S.A.).
7-22-75	11	Filed pltffs notice of motion & Rule ((g) statement for summary judgment. Ret. 8-1-75.
7-22-75	12	Filed affdvt in support of motion for summary judgment.

DATE	NR.	PROCEEDINGS
7-22-75	13	Filed pltffs memo of law in support of motion for summary judgment.
7-25-75	14	Filed Pltff's Reply to Counterclaim of intervenor-deft.
8-14-75	15	Filed Stip & Order adj Pltff's motion for summ judge from 8-14-75 to 8-28-75 . . . . . Lasker, J.
8-29-75	16	Filed Govt-USA's Notice of Motion for an orderpur to 56 FRCP awarding summ judg to U.S. . . . . ret. 9-10-75 . . . at 10am.
8-29-75	17	Filed USA's Memo of Law in support of Motion for summ judg.
8-29-75	18	Filed Exhibit to USA's Memo of Law.
10-1-75	19	Filed pltffs statement concerning those of defts "facts" as to which there are genuine issues.
10-1-75	20	Filed pltffs memo in opposition to intervenor-defts motion for summary judgment.
10-1-75	21	Filed by pltff affdvt of Lorne C.D. MacBeth.
10-15-75	22	Filed Govt's Reply Memo of Law.
12-31-75	23	Filed Opinion #43649. Both motions for summary judgment are denied. Lasker J. (mailed notice)
02-20-76	24	Filed Pltffs. Notice of Change of Attys. Name.

(Continued)

Bristol Lab. Div. of Bristol Myers Co. vs. Staats, U.S.

Lasker J. 75 Civil 1334

DATE	PROCEEDINGS
	Page #3
2-23-76	Filed Dft. & Dft. Intervenor Notice of Deposition of Bristor Lab. Div. etc. on 3-18-76.
07-02-76	Filed deposition of Bristol Laboratories by Richard J. Cormier on 4-6-76. (mailed notice)
10-1-76	Filed Intervenor-deft affidavit and motion ret. 10-22-76.
	Filed govt's memo in support of its motion for summary judgment.
11-5-76	Filed notice of motion for summary judgment ret. 11-15-76 at 10:00 am
11-5-76	Filed memo in support of pltffs renewed motion for summary judgment etc.

DATE	NR.	PROCEEDINGS
11-5-76		Filed Supplemental statement under Rule 9g
11-16-76		Filed govts memo in opposition to pltffs motion for summary judgment.
4-11-77		Filed opinion # 45769 Bristol's motion for summary judgment is granted Govt summary judgment motion is denied Submit judgment on notice Lasker J
7-15-77		Filed Judgment motion for summary judgment of intervenor dft. U.S.A. is denied motion for summary judgment of pltff is granted in all respects, as indicated, counterclaim of USA is dismissed . . . . . Lasker J. Judgment entered 7-15-77 Entered 7-15-77 (mailed notice)
7-18-77		Filed letter to Judge Lasker from U.S.Atty. SDNY dtd. 7-6-77. response & in further support of Comptrollers proposed judgment.
7-18-77		Filed letter to Judge Lasker from U.S. Atty. SDNY dtd. 6-30-77. Re: counter proposed judgment.
7-18-77		Filed Pltffs. Memorandum in opposition to dfts. submission of counter proposed judgment.
9-12-77		Filed intervenor-deft and Elmer B. Staats, Notice of Appeal to the USCA for the 2nd Circuit from the final judgt. entered on 7-15-77.
9-23-77		Filed Pltffs. Notice of Appeal from Judgment dtd. 7-15-77. (mn)
10-21-77		Filed Notice of Certification Record to the USCA.
11-17-77		Filed True Copy of USCA Mandate. Ordered that this action be remanded to the U.S. District Court for the SDNY without prejudice to the pursuance of the appeals from the judgment ent. 7-15-77 etc. (mn)
6/28/79		Filed Copy of Minuete Order pur to Administrative office dtd. 6/15/73, action is statically closed & clerk instructed to submit JS for each case. Orig. filed in 64 Civil 3558-38 (MN)
9-7-79		Fld Consented Protective Order, Lasker J.

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF-APPELLEE

v.

ELMER B. STAATS, Comptroller General of the United States, DEFENDANT-APPELLANT,

-and-

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT-APPELLANT

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

T-7914

DATE	FILINGS-PROCEEDINGS
	77-6153
9-13-77	Filed copies of docket entries and notice of appeal (USA) (*77-6153*)
9-21-77	Naomi Reice Buchwald, Esq. filed Form C, p/s
9-21-77	Naomi Reice Buchwald, Esq. filed Form D, p/s
9-24-77	Filed copies of notice of appeal and docket entries, (*Bristol Lab. Div.*) (*& in 77-6159*)
10-3-77	Received docket fee (*Bristol Lab*) (*& in 77-6159*)
10-3-77	Weil, Guttman & Davis filed Form C, p/s (& in 77-6159)
10-3-77	Weil, Guttman & Davis filed Form D, p/s (& in 77-6159)
10-5-77	Filed scheduling order #1 (CAMP), PC
10-21-77	Filed record (original papers of district court)
11-7-77	Received stipulation in re: remand to the District Court, etc. (& in 77-6159)
11-14-77	Filed order remanding action to the District Court without prejudice to the pursuance of the appeals from the judgment entered on 7-15-77 after the completion of the proceedings on remand

DATE	FILINGS-PROCEEDINGS
11-15-77	Issued certified copy of order remanding action to the District Court and copy of stipulation in re: remand (& in 77-6159)
11-18-77	Original record returned to district court (& in 77-6159)
12-14-77	Filed receipt of return of original record to district court (& in 77-6159)
12-7-79	Copy of district court "protective order on consent" pursuant to order of USCA dated 11-14-77 remanding action filed. (construed as reinstating appeal pursuant to 11-14-77 order USCA)
12-7-79	Record on appeal filed (Original papers of district court)
12-7-79	Appellant Comptroller General of USA brief, pfs filed
12-7-79	Appellant Comptroller General of USA appendix pfs filed.
12-27-79	Scheduling Order #1, filed.
2-8-80	Appellee Bristol Laboratories Div. brief, pfs filed
2-29-80	Appellant Comptroller General of USA reply brief, pfs filed.
3-10-80	Case argued before Friendly, Feinberg, CJJ, Sifton, D.J.
3-25-80	Judgment affirmed, published opinion, Per Curiam
3-25-80	Judgment filed.
4-24-80	Mandate (Judgment) issued.
8-27-80	Notice of filing of petition for writ of certiorari filed.
12-10-80	Certified copy if order of Supreme Court granting petition for writ of certiorari filed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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75 Civ. 1334

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, Comptroller General of The United States, DEFENDANT,

-and-

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

MEMORANDUM

APPEARANCES:

WEIL, LEE & BERGIN, ESQS.
60 East 42nd Street
New York, New York 10017
Attorneys for Plaintiff
of Counsel: GILBERT H. WEIL, ESQ.
ROBERT L. SHERMAN, ESQ.

THOMAS J. CAHILL, ESQ.
United States Attorney for the Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
NAOMI REICE BUCHWALD, ESQ.
J. ROGER EDGAR, ESQ.
JOHN G. BROSNAN, ESQ.

LASKER, D.J.

This case involves the scope of the contractual and statutory right of the government to examine certain books and records of the Bristol Laboratories Division of Bristol-Myers Co. (Bristol Labs). Bristol Labs and the

United States, as intervenor-defendant, cross move for summary judgment. The existence of a critical factual question precludes granting judgment for either party.

During 1973 and 1974 Bristol Labs was awarded a number of contracts with the Veterans Administration and the Department of Defense for the sale of pharmaceutical products. Pursuant to 41 U.S.C. § 254(c) each of the contracts included a provision that provides:

> "The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under this contract . . . have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor [or any of its subcontractors] involving the transactions related to this contract."

By letter dated August 26, 1974, Elmer Staats, Comptroller General, informed Bristol Labs that the General Accounting Office was reviewing the procurement of drugs by agencies of the federal government, including the pricing of drugs procured under negotiated contracts. Staats requested pursuant to the contract and to 31 U.S.C. §§ 53, 67; 10 U.S.C. § 2313(b); and 41 U.S.C. § 244(c) that cost records pertinent to the contracts between Bristol and the government be made available for inspection, including:

> "but . . . not limited to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests." (Exhibit A to the affidavit of Gilbert Weil, submitted in support of plaintiff's motion for summary judgment; Appendix I to affidavit of James Martin, submitted in support of the government's motion for summary judgment.)

This suit arises out of Bristol's unwillingness to allow the government to review records concerning costs incurred

for research and development; marketing and promotion; and distribution and administration.

The documents, affidavits and memoranda of law submitted by the parties establish that the controversy is not as much over the legal construction of the right-of-access clause in the contracts and statutes, as it is a factual dispute concerning Bristol's actual accounting and business procedures.

Bristol does not dispute the government's authority to examine records and verifying data relating to manufacturing costs of the products purchased under the subject contracts and to the establishment of prices for those articles. (Memorandum of law submitted in opposition to the Government's motion for summary judgment, p. 3) Bristol further concedes that the Comptroller General may examine:

> "those records which are directly pertinent to costs incurred in the course of plaintiff's activities related to the supplying of those items purchased under the subject contracts, even though the costs are not assigned by plaintiff to such items." (Memorandum in support of plaintiff's motion for summary judgment, p. 5)

However, Bristol claims that it "does not consider expenses incurred for research and development; advertising and promotion; general and administrative; and distribution . . . in setting contract prices to the Federal Government." (Affidavit of Lorne MacBeth, Vice-President-Marketing, Bristol ¶ 5), and that these records are consequently not subject to governmental examination. Yet, as the government points out, Bristol is inconsistent as to whether costs for those activities are reflected in the price of the products sold to the United States. It notes that Bristol does not, in its Rule 9(g) statement, state that these expenditures are not recovered from *government* revenues, but only that it recovers them

"through revenues generated from sales of its prod-

ucts without allocating them to any customer class, customer or contract."

While the Government agrees with Bristol that the access-to-records clause does not give the Comptroller General access to Bristol's cost records "which are exclusively assigned to or recovered from that firm's non-Government business," (Memorandum of law in support of government's motion for summary judgment, p. 14), the government resists any attempt by Bristol to "frustrate" what it considers to be the legitimate scope of an examination by failing to assign costs, which comprise a portion of the price charged the government, to specific products, and seeks access to Bristol's records as to those costs in order to determine their relationship, if any, to the subject contracts.

Without information as to how these costs are recovered, what Bristol's research and development, and marketing and promotion activities entail, or its method of accounting, it is impossible to determine the correctness of either party's position.

Discovery is necessary to enable the government to inform itself as to Bristol's methods of accounting and allocation of costs. However, Bristol legitimately fears that allowing the Comptroller General to examine its general business records would in essence bring about the opening of its books to the same extent as granting final relief.

We agree with Bristol Labs that the initial discovery to which the Comptroller General is entitled should not be of such scope as to amount to the granting of final relief. Accordingly, both motions for summary judgment are denied. The proper course to follow is to restrict initial discovery by the Comptroller General to deposition of knowledgeable officials of Bristol Labs as to Bristol's methods and procedures for allocation of costs of all items not allocated exclusively to non-government contracts. No discovery shall be made of the books or accounts of Bristol Labs

until termination of the depositions authorized above. Upon termination of such depositions the parties shall be free to move for such relief as appears justified.

The motions are disposed of as indicated above.

It is so ordered.

Dated: New York, New York
December 31, 1975.

MORRIS E. LASKER
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No.
75 CIV 1334

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT.

COMPLAINT FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

Plaintiff, for its complaint herein alleges:

1. Plaintiff Bristol Laboratories is an unincorporated division of Bristol-Myers Company, a Delaware corporation, the principal office of Bristol-Myers Company being in the City of New York, State of New York.

2. The defendant is the Comptroller General of the United States, and, upon information and belief, is not a resident of any state within which plaintiff maintains a principal office.

3. The amount in controversy in the within action exceeds $10,000.00 exclusive of interest and costs.

4. This action arises under the laws of the United States, including the Armed Services Procurement Act, 10 U.S.C. § 2313(b), the Federal Property and Administrative Services Act, 41 U.S.C. § 254(c), and the Administrative Procedure Act, 5 U.S.C. §§ 501 *et seq.*

5. An actual controversy, justiciable in character, exists between the parties hereto with regard to the matters hereinafter set forth.

6. This court has jurisdiction of this action under 28 U.S.C. §§ 1331, 1332, 1337, and 2201-2202, as well as under 5 U.S.C. § 702.

7. During the years 1973 and 1974 plaintiff entered into a number of contracts with the Veterans Administration and with the Department of Defense of the United States for the sale thereto of certain pharmaceutical products.

8. Each of said contracts incorporated within it a provision conferring and delimiting rights of the defendant to have access to and examine certain of plaintiff's records, said agreement being expressed in the following terms:

> "[T]he Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of [Bristol Laboratories] or any of [its] subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts."

9. Defendant, claiming to be acting pursuant to said contractual provision, is now demanding access to and examination of certain of plaintiff's books, documents, papers, and records, and has threatened that unless plaintiff accedes to such demands defendant "will be required to take such action deemed appropriate to the exercise of our rights under the contracts and the execution of our statutory responsibilities."

10. Plaintiff has, to the contrary, maintained, and alleges, that the items defendant seeks access to and examination of do not constitute books, documents, papers, or records which are directly pertinent to and involve transactions related to the contracts or any subcontracts referred to in paragraphs 7 and 8 above.

11. The items referred to in paragraph 10 above contain highly confidential and sensitive business information and any threat, or weakening or loss of their security will be highly injurious to plaintiff.

12. Without the relief sought herein, defendant's above described unlawful demands, and any overt attempts made

by him to enforce them, will cause plaintiff severe and irreparable injuries, for which it will have no adequate remedy at law.

WHEREFORE, plaintiff prays that this court issue judgment:

1. Declaring that defendant is not entitled to have access to or to examine the books, documents, papers, or records, or any of them, referred to in paragraphs 7 and 8 above; and
2. ordering defendant to specifically conform and confine his examination and attempts to examine plaintiff's books, documents, papers, and records to the terms of the contracts referred to in paragraph 8 above; and
3. enjoining the defendant, temporarily and permanently, and all persons representing him or acting under his direction and authority or acting in concert or participation with him from making any efforts or taking any steps to gain access to or to examine any of said books, documents, papers, or records; and
4. granting such other or further relief as may be appropriate.

Respectfully submitted,
WEIL, LEE & BERGIN

By:/s/_____

Gilbert H. Weil
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60 East 42nd Street
New York, New York 10017
(212) 687-8573

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, Comptroller General of The United States, DEFENDANT.

ANSWER

ELMER B. STAATS, Comptroller General of the United States, by his attorney, Paul J. Curran, United States Attorney for the Southern District of New York, for his answer to the Complaint herein alleges as follows:

FIRST: Admits the allegations contained in Paragraph 1 of the Complaint.

SECOND: Admits the allegations contained in Paragraph 2 of the Complaint.

THIRD: Denies the allegations contained in Paragraph 3 of the Complaint.

FOURTH: Denies the allegations contained in Paragraph 4 of the Complaint.

FIFTH: Denies the allegations contained in Paragraph 5 of the Complaint.

SIXTH: Denies the allegations contained in Paragraph 6 of the Complaint.

SEVENTH: Admits the allegations contained in Paragraph 7 of the Complaint.

EIGHTH: Denies the allegations contained in Paragraph 8 of the Complaint.

NINTH: Denies the allegations contained in Paragraph 9 of the Complaint, but admits that a letter dated March 6,

1975 from Elmer B. Staats, Comptroller General of the United States, to Richard L. Gelb, President and Chief Executive Officer of Bristol-Myers Company, contains the words quoted in Paragraph 9 and respectfully refers the Court to that letter for the full contents and meaning thereof.

TENTH: Denies the allegations contained in Paragraph 10 of the Complaint, but respectfully refers the Court to the correspondence and other communications between the parties for the full contents and meaning thereof.

ELEVENTH: Denies having knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 of the Complaint.

TWELFTH: Denies the allegations contained in Paragraph 12 of the Complaint.

FIRST DEFENSE

THIRTEENTH: The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendant respectfully demands that the complaint herein be dismissed and judgment be awarded to the defendant including the costs and disbursements of this action and granting such other relief as the Court may deem appropriate.

Dated: New York, New York
May 19, 1975

PAUL J. CURRAN
United States Attorney
Attorney for Elmer B. Staats,
Comptroller General of the
United States

By: /s/ _____
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

v.

ELMER B. STAATS, Comptroller General of the United States, DEFENDANT

DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

The defendant, Elmer B. Staats, Comptroller General of the United States, by James D. Martin, makes the following answers to written interrogatories served by plaintiff on May 30, 1975.

Plaintiff's Interrogatory No. 1

"1. Identify or describe, as specifically and precisely as possible, each separate book, document, paper or record of the plaintiff to which the defendant claims a right of access and examination."

Answer to Interrogatory No. 1

Defendant does not have knowledge or information sufficient to respond to this interrogatory and accordingly avails itself of the alternative proposed by plaintiff and responds to Interrogatory No. 2.

Plaintiff's Interrogatory No. 2.

"2. If defendant cannot thus identify or describe a par-

ticular book, document, paper or record, then specify it by designing its generic type and nature of subject content."

Answer to Interrogatory No. 2

Defendant maintains that its right of access and examination includes, but is not limited to the following categories of records:

(a) Records relating to those costs assigned by plaintiff to the products purchased under the subject contracts, which industry representatives have indicated are limited essentially to manufacturing costs.

(b) Records relating to those costs which, although they are incurred during the course of plaintiff's activities relating to the supply of ethical pharmaceuticals (including those purchased under subject contracts), are not assigned by the firm to individual products. These costs would include those incurred for activities such as research and development, marketing and promotion, distribution and administration.

(c) Records relating to the methodology, and decisions involved in plaintiff's establishment of prices for the products purchased under the subject contracts.

(d) Records required to verify, to the extent deemed necessary, all data obtained during the course of any review conducted.

However, because of the need to verify all data and because General Accounting Office (GAO) representatives have been provided only very limited access to records by plaintiff, it is not feasible to identify more precisely the specific records needed to be obtained and examined in order to conduct our review.

Plaintiff's Interrogatory No. 3

"3. With respect to each such particular or class of book, document, paper or record identified in response to Interrogatories 1 and 2 above:

A. Name and describe fully:

(1) the specific nature of the transaction or transactions which defendant claims such book, document, paper or record (a) involves and (b) is directly pertinent to; and

(2) the manner and respects in which, and the reasons why, defendant claims each such book, document, paper or record does involve and is directly pertinent to each such transaction.

B. Identify each contract or subcontract to which defendant claims each transaction referred to in Interrogatory 3A(1) relates."

Answer to Interrogatory No. 3

The transactions involved are transactions which relate to the contracts between plaintiff and the Veterans Administration and the Department of Defense, specified in the letter of August 26, 1974, from Elmer B. Staats, Comptroller General of the United States, to Richard Gelb, President and Chief Executive Officer of plaintiff which is annexed hereto as Exhibit A and made a part hereof. Because of the limited access afforded GAO's representatives to the records of the plaintiff, it is not possible to identify the specific transactions to which a particular book, document, paper or record is directly pertinent or with which it is involved.

Beyond the answer herein provided, this interrogatory is objected to on the grounds set forth in the accompanying objections.

Dated: New York, New York

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

By: /s/ _____

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TO: WEIL, LEE & BERGIN
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60 East 42nd Street
New York, New York 10017
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CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

James D. Martin being duly sworn, deposes and says:

I am, Deputy Director of the Manpower and Welfare Division of the General Accounting Office and have read the interrogatories served upon defendant by plaintiff and the foregoing answers or responses to those interrogatories are true according to the best of my informaton and belief.

/s/ _____
JAMES D. MARTIN

Subscribed and sworn to before me this 27 day of June 1975

/s/ Mary F. Webb
Notary Public

COMPTROLLER GENERAL OF THE
UNITED STATES
WASHINGTON, D.C. 20548

B-146857 August 26, 1974

Mr. Richard L. Gelb
President and Chief Executive Officer
Bristol Laboratories
Division of Bristol-Myers Company
345 Park Avenue
New York, New York 10022

Dear Mr. Gelb:

As you know, because of the increasing Federal involvement in the procurement of pharmaceuticals, the General Accounting Office has underway a review of the procurement of drugs by agencies of the Federal Government, including the pricing of drugs and pharmaceuticals procured under negotiated contracts. This examination is being conducted at several drug companies, including Bristol Laboratories Division, Bristol-Myers Company, and is being made pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), the Accounting and Auditing Act of 1950 (31 U.S.C. 67), and the authority of the Comptroller General to examine contractors' records under the contract provisions pursuant to 10 U.S.C. 2313(b) and 41 U.S.C. 254(c).

For some time we have been attempting to gain access to records we consider necessary to conduct such a review. In this regard, in June 1973 we met with representatives of the Pharmaceutical Manufacturers Association and six drug firms to initiate a comprehensive review using data provided on a voluntary basis by representative industry firms. However, the industry firms have not provided us access to the records necessary to satisfactorily carry out our statutory responsibilities.

On a number of occasions since this effort was initiated, representatives of the drug industry have questioned our right to access to necessary records on the grounds that (1) our request for cost data was considered inappropriate

because the contracts were negotiated on the basis of standard catalog prices without regard to cost or profit margins; (2) the records apply basically to non-Government work; and (3) disclosure of cost data would be of benefit to competitors and damage the company if publicly disclosed. Our Office's right of access to such records was clearly decided by the courts in *Hewlett-Packard Company* v. *United States*, 385 F.2d 1013 (9th Cir. 1967), cert. denied 390 U.S. 988 (1968). The Hewlett-Packard case involved all of the issues the industry has raised.

The purpose of this letter is to formally request that cost records pertinent to contracts listed on enclosure 1 be made available for our examination as provided by the terms of the negotiated contracts awarded to your company by the Defense Supply Agency and the Veterans Administration. We must request that you have the responsible officials at Bristol Laboratories make available to the General Accounting Office as required, all books, documents, papers, and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests. For your information, statements from the legislative history pertaining to the "Examination of Records" clause included in the contracts and our position on the duties and responsibilities that the clause imposes upon my Office are presented in enclosure 2.

We request also that you advise us within 15 days with respect to your decision to make these records available for our examination.

Sincerely yours,

/s/ _____

ELMER B. STAATS
Comptroller General
of the United States

Enclosures—2

LISTING OF CONTRACTS AND, WHERE APPROPRIATE, PURCHASE (DELIVERY) ORDERS TRANSACTED BETWEEN THE U.S. GOVERNMENT AND BRISTOL LABORATORIES

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0012	Oct. 25, 1973
0013	Jan. 3, 1974
0014	Jan. 8, 1974
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ENCLOSURE 2

LEGISLATIVE HISTORY AND THE GENERAL ACCOUNTING OFFICE POSITION PERTAINING TO THE EXAMINATION OF RECORDS' CLAUSES

The cited clauses (Clause 10 of the Standard Form 32) were included in the contracts pursuant to Public Law 245, Eighty-second Congress, 65 Stat. 700, which amended section 4 of the Armed Service Procurement Act of 1947 (codified as 10 U.S.C. 2313) and section 304 of the Federal Property and Administrative Services Act of 1949 (codified as 41 U.S.C. 254(c)) by adding the following subsection:

> "(c) All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts."

Senate Report 603, Eighty-second Congress, to accompany Senate bill 921, which was later enacted as Public Law 245, explained the purpose of the legislation as follows:

> "The Federal Property and Administrative Services Act of 1949 and the Armed Services Procurement Act of 1947 are general legislation of permanent application to a very large percentage of Government procurement. They authorize negotiation of contracts

without advertising under certain specified circumstances in the discretion of the agency head. Since it is well recognized that negotiated contracts are at the same time effective procurement instrumentalities under special circumstances, and require close supervision and control, this legislation would make examination by the Comptroller General a permanent part of procurement procedure on a basis of extending the examination provisions added to the First War Powers Act by Public Law 921 of the Eighty-first Congress."

In considering the legislation, the following statement was made on the floor of the House of Representatives by Congressman Hardy on October 15, 1951 (97 Cong. Rec. 13197):

"This brings up another point. As I have indicated, the authority contained in this bill is really only necessary to cover those cases where the contractors refuse to permit the General Accounting Office to inspect their books and records. As I have already pointed out, the vast majority of contractors do make their books available on a voluntary basis when requested. Thus, this bill would affect that comparative few contractors who now refuse the agent of the Congress permission to see their records. It would be compulsory upon them. It seems logical to me to suppose that there is greater need for the GAO to see the records of those few who do not wish to make them available on a voluntary basis than it is to see the records of those who readily comply. To put it bluntly, those with nothing to hide have nothing to fear by opening their books to the General Accounting Office."

The language of the act and of the legislative history clearly establishes that the statutory provision was enacted to make possible the close supervision and control over negotiated procurements which the Congress regarded as necessary in the interest of the Government. This purpose requires that the act, and the contract provision which is almost identical in language, be interpreted to permit such detailed examination of the contractor's

records to assure the necessary degree of supervision and control. In other words, the clear intent of the statute was to provide for the examination by our Office of such of the contractor's records as would permit a valid evaluation of the reasonableness of the prices charged. This is clearly established by further remarks made by Congressman Hardy on the floor of the House of Representatives immediately after those quoted above (97 Cong. Rec. 13198) as follows:

> "In normal times, competitive bidding generally operates as a brake on the price which a contractor can demand from the Government for his goods and services. However, these are not normal times, and it should be obvious to all of us concerned with the expenditure of billions of dollars for national defense that we must establish every reasonable safeguard against waste and extravagance in the spending of these vast sums. Under conditions as they now exist, competitive bidding has little or no effect upon contracts which are negotiated without advertising. As a result, when a contract is being negotiated, here is a typical illustration of what usually happens: A contractor with years of experience comes to the conference table accompanied by a highly competent accountant and equally competent lawyer. The Government representative on the other side of the table will, in a great majority of cases, be at a tremendous disadvantage, from the standpoint of both training and experience, no matter how conscientious and honest he may be. So, aside from any intentional liberality on the part of the Government contracting officer, there is every chance in the world that the Government will come out on the short end of the deal. *This bill would at least enable the agent of the Congress to check the transactions, both from the Government records and the contractor's books.*" (Emphasis supplied).

The language of the access to records clauses included in the pertinent agreements is modeled closely after the statutory language and was undoubtedly intended to be coextensive in scope. Therefore, we must adhere to the

position stated earlier that under the contracts we are authorized to examine such of the contractor's records as would permit a valid evaluation of the reasonableness of the prices charged without regard to the factors considered or ignored by the contractor in establishing those prices.

Even though other factors are considered in establishing the prices for drugs furnished to the Government and the prices established for may not be directly proportionate to costs, costs of production nevertheless directly pertain to, and involve transactions related to, the contract. Although it is not a condition to the legal authority of the General Accounting Office to have access to such records, we believe that cost records are directly pertinent to the prices established. We believe also that an examination of the relationship of experienced and estimated costs to the prices paid by the Government, and of the pricing methods used in establishing the prices, is clearly within the scope of the type of examination contemplated and required by the terms of the contract.

It is our position, consistent with our interpretation of the act and the contract provision, (1) that all books, documents, papers, and other records relating to the pricing and cost of performance of negotiated contracts are records relating directly to the contracts and to the Government's financial interest, (2) that such books, documents, papers, and other records are not limited to the formal cost accounting records and their supporting data, but include all underlying data concerning contract activities and operations which afford the basis for, or are involved in any way with, the incurrence of costs by the contractor, (3) that the cost records which we requested and other data supporting the prices charged to the Government by the contractor are directly pertinent to the contracts, and (4) that therefore all such books, documents, papers, and other records and underlying data are subject to examination by the General Accounting Office under its statutory responsibility and authority to examine activities and related costs under negotiated contracts.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF

v.

ELMER B. STAATS, Comptroller General of the United States, DEFENDANT

and

UNITED STATES OF AMERICA, INTERVENOR

INTERVENOR'S ANSWER AND COUNTER-CLAIM

The UNITED STATES OF AMERICA, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, for its answer to the Complaint herein and its counterclaim alleges as follows:

FIRST: Admits the allegations contained in Paragraph 1 of the Complaint.

SECOND: Admits the allegations contained in Paragraph 2 of the Complaint.

THIRD: Denies the allegations contained in Paragraph 3 of the Complaint.

FOURTH: Denies the allegations contained in Paragraph 4 of the Complaint.

FIFTH: Denies the allegations contained in Paragraph 5 of the Complaint.

SIXTH: Denies the allegations contained in Paragraph 6 of the Complaint.

SEVENTH: Admits the allegations contained in Paragraph 7 of the Complaint.

EIGHTH: Denies the allegations contained in Paragraph

8 of the Complaint.

NINTH: Denies the allegations contained in Paragraph 9 of the Complaint, but admits that a letter dated March 6, 1976 from Elmer B. Staats, Comptroller General of the United States, to Richard E. Gelb, President and Chief Executive Officer of Bristol-Myers Company, contains the words quoted in Paragraph 9 and respectfully refers the Court to that letter for the full contents and meaning thereof.

TENTH: Denies the allegations contained in Paragraph 10 of the Complaint, but respectfully refers the Court to the correspondence and other communications between the parties for the full contents and meaning thereof.

ELEVENTH: Denies having knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 of the Complaint.

TWELFTH: Denies the allegations contained in Paragraph 12 of the Complaint.

FIRST DEFENSE

THIRTEENTH: The complaint fails to state a claim upon which relief can be granted.

COUNTERCLAIM

FOURTEENTH: This case arises under 10 U.S.C. § 2313(b), 41 U.S.C. § 254(c) and four contracts entered into between the Veterans Administration, Marketing Division, Drug & Chemicals and the Defense Personnel Support Center, Defense Supply Agency and the Bristol Laboratories Division of Bristol-Myers Company (hereinafter referred to as Bristol) pursuant to 10 U.S.C. § 2304(a) and 41 U.S.C. § 252(c).

FIFTEENTH: Jurisdiction is conferred upon this Court by virtue of 28 U.S.C. § 1345 and a request for relief is made pursuant to Title 28 U.S.C. §§ 2201 and 2202.

SIXTEENTH: Plaintiff Bristol is an unincorporated division of Bristol-Myers Company, a corporation organized

and existing under the laws of the State of Delaware, with its principal place of business located in New York, New York.

SEVENTEENTH: On or about March 29, 1973, the Veterans Administration, Marketing Division, Drugs & Chemicals, awarded a contract to plaintiff Bristol which contract was designated as contract number V797P-5929b, wherein Bristol agreed to furnish the Veterans Administration, Marketing Division, Drugs & Chemicals, certain pharmaceutical products. This contract was negotiated pursuant to the provisions of 41 U.S.C. 252(c)(10) and final payment on such contract was made on or about June 25, 1974.

EIGHTEENTH: On or about March 29, 1974, the Defense Personnel Support Center, Defense Supply Agency awarded a contract to plaintiff Bristol which contract was designated as contract number DSA120-74-C-2724, wherein Bristol agreed to furnish to the Defense Personnel Support Center, Defense Supply Agency certain pharmaceutical products. This contract was negotiated pursuant to the provisions of 10 U.S.C. 2304(a)(7) and final payment was made on such contract on or about July 26, 1974.

NINETEENTH: On or about February 26, 1974, the Defense Personnel Support Center, Defense Supply Agency awarded a contract to plaintiff Bristol which contract was designated as contract number DSA120-74-C-2404 wherein Bristol agreed to furnish to the Defense Personnel Support Center, Defense Supply Agency certain pharmaceutical products. This contract was negotiated pursuant to the provisions of 10 U.S.C. 2304(a)(7) and final payment on such contract was made on June 4, 1974.

TWENTIETH: On or about January 23, 1973, the Defense Personnel Support Center, Defense Supply Agency awarded a contract to plaintiff Bristol which contract was designated as contract number DSA120-73-D-1769, wherein Bristol agreed to furnish to the Defense Personnel Support Center, Defense Supply Agency certain pharmaceutical products. This contract was negotiated

pursuant to the provisions of 10 U.S.C. 2304(a)(7) and final payment on such contract was made on June 24, 1974.

TWENTY-FIRST: Each of the aforementioned contracts exceeded the sum of $2,500. Pursuant to the provisions of 41 U.S.C. 254(c) the above-numbered contract mentioned in paragraph SEVENTEENTH of this counterclaim incorporates by reference Veterans Administration Marketing Center Supplemental Provisions No. 1, March 18, 1972, which includes a clause identified as "Examination of Records by Comptroller General" which provides, in part, as follows:

> "(b) The contractor agrees that the Comptroller General of the United States of any of his duly authorized representatives shall, until the expiration of 3 years after final payment under this contract, or such lesser time specified in either Appendix M of the Armed Service Procurement Regulation or the Federal Procurement Regulations Part 1–20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.
>
> "(c) The contractor further agrees to include in all his subcontracts hereinunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under the subcontract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1–20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor involving transactions related to the subcontract. The term 'subcontract' as used in this clause excludes (1) purchase orders not exceeding $2,500 and (2) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public."

TWENTY-SECOND: Pursuant to the provisions of 10 U.S.C. § 2313(b) the above-numbered contracts mentioned

in paragraphs EIGHTEENTH and NINETEENTH incorporated by reference Defense Personnel Support Center Master Solicitation (Medical) DPSC Form 3539, January 1973, which incorporates by reference a clause entitled "Examination of Records by Comptroller General" as set forth at Armed Services Procurement Regulation 7–104.15 (1971 ed.). The provisions of this clause are identical to those contained in the clause mentioned in paragraph TWENTY-FIRST of this counterclaim.

TWENTY-THIRD: Pursuant to the provisions of 10 U.S.C. § 2313(b) the above-numbered contract mentioned in paragraph TWENTIETH incorporates by reference Defense Personnel Support Center Master Solicitation, DPSC Form 3385, January 1972, which incorporates by reference a clause entitled "Examination of Records by Comptroller General" as set forth at Armed Services Procurement Regulation 7–104.15 (1971 ed.). The provisions of this clause are identical to those contained in the clause mentioned in paragraph TWENTY-FIRST of this counterclaim.

TWENTY-FOURTH: The contracts mentioned in paragraphs SEVENTEENTH, EIGHTEENTH, NINETEENTH and TWENTIETH of this counterclaim were not entered into by means of formal advertising.

TWENTY-FIFTH: On August 26, 1974, Elmer B. Staats, Comptroller General of the United States, pursuant to the provisions of the clauses denominated "Examination of Records by Comptroller General" mentioned in paragraphs TWENTY-FIRST, TWENTY-SECOND and TWENTY-THIRD of this counterclaim requested from Richard L. Gelb, President and Chief Executive Officer of Bristol, all books, documents, papers, and other records relating to experienced costs including costs of direct materials, labor, overhead, and other corporate costs, support for prices charged to the Government, and such other necessary information which would permit his duly authorized representatives to review the reasonableness of the contract prices provided for in the contracts set forth in this counterclaim.

TWENTY-SIXTH: On September 13, 1974, Douglas R. Purdy, Vice President of Bristol informed the Comptroller General that Bristol would make available to representatives of the Comptroller General "those cost records deemed to be pertinent to said contracts." However, Bristol has refused to honor the Comptroller General's request of August 26.

TWENTY-SEVENTH: Upon information and belief, the books, documents, papers and records relating to the pricing and experienced costs, including costs of direct material, labor, overhead, and other corporate costs hereinbefore mentioned are in the custody and control of the plaintiff Bristol including its officers and subordinates.

TWENTY-EIGHTH: The refusal of the plaintiff to permit the Comptroller General of the United States or his authorized representatives to have access to and to examine the cost data mentioned in paragraph TWENTY-FIFTH of this counterclaim relating to the enumerated contracts in this counterclaim constitutes a violation of the provisions of the "Examination of Records by Comptroller General" clauses included in the contracts pursuant to 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(e) and is in direct contravention of the provisions of clauses contained in the contracts. The refusal to make available for inspection the aforesaid books and records of plaintiff Bristol containing the cost data relating to these contracts have prevented and will continue to prevent the Comptroller General of the United States from discharging his duty and right to examine such books and records and will infringe upon the interest and rights of the United States with respect to the supervision and control of procurement contracts negotiated on behalf of the Federal Government.

TWENTY-NINTH: Intervener has no adequate remedy at law.

WHEREFORE, defendant intervener prays that this court issue an order:

1. Declaring that pursuant to the provisions contained in the contracts designated and referred to in paragraphs

SEVENTEENTH, EIGHTEENTH, NINETEENTH and TWENTIETH of this counterclaim and the provisions of 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), the Comptroller General of the United States and his duly authorized representatives have the right to examine all books, documents, papers, or records directly relating to the pricing and cost of producing the items furnished by plaintiff Bristol under the aforesaid contracts, including but not limited to records of experienced costs including costs of direct materials, labor, overhead, and other corporate costs, records in support of prices charged by the plaintiff and all other data and records of Bristol concerning activities and operations of said company which were involved in any way with the incurrence of costs in furnishing the items produced pursuant to said contracts.

2. Enjoining plaintiff Bristol, its officers, agents, servants, attorneys, employees and all persons in active concert or participation with them who receive actual notice of an order by personal service or otherwise, from preventing the duly authorized representatives of the Comptroller General of the United States from obtaining access to and examining any books, documents, papers, or records of the plaintiff that relate to and involve transactions relating to the pricing and cost of producing the items which were furnished by the plaintiff Bristol pursuant to the four contracts enumerated in this counterclaim; and directing plaintiff Bristol including its officers and subordinates at a time and date fixed by the Court to have available on the premises of Bristol Laboratories Division of Bristol-Myers Company, New York, New York, such books and records which the Court adjudges in this action the Comptroller General and his duly authorized representatives have the right to examine.

3. Enjoining plaintiff Bristol acting by and through its officers and subordinates from preventing the duly authorized representatives of the Comptroller General of the United States from obtaining access to and examining any books, documents, papers, or records of plaintiff that relate to and involve transactions relating to pricing and ex-

perienced costs including costs of direct materials, labor, overhead and other corporate costs, support for prices charged to the Government and such other necessary information which would permit his representatives to review the reasonableness of the contract prices provided for in the aforesaid contracts.

4. Dismissing the complaint and granting such other and further relief as may be just and equitable.

Dated: New York, New York
July 3, 1975.

Respectfully submitted,

PAUL J. CURRAN
United States Attorney for the Southern District of New York
Attorney for the United States of America

By: /s/_____
NAOMI REICE BUCHWALD
Assistant United States Attorney
Office & Post Office Address:
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No.
75 CIV 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF
BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL
OF THE UNITED STATES, DEFENDANT,

and

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

REPLY TO COUNTERCLAIM

Plaintiff, for its reply to intervenor-defendant's counterclaim, states as follows:

1. Admits the allegations of paragraph Fourteenth of intervenor-defendant's counterclaim to the extent that the action arises under 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) and that plaintiff entered into contracts with the Defense Personnel Support Center and independently thereof entered into a contract with the Veterans Administration.

2. Denies that this Court has jurisdiction under 28 U.S.C. § 1345, as alleged in paragraph Fifteenth of intervenor-defendant's counterclaim, but admits that this Court has jurisdiction under 28 U.S.C. §§ 1331, 1332, 1337, 2201, 2202 and 5 U.S.C. § 702.

3. Admits the allegations of paragraph Sixteenth of intervenor-defendant's counterclaim.

4. Admits the allegations of paragraph Seventeenth of intervenor-defendant's counterclaim.

5. Admits the allegations of paragraph Eighteenth of intervenor-defendant's counterclaim.

6. Admits the allegations of paragraph Nineteenth of intervenor-defendant's counterclaim, except that contract number DSA 120-74-C-2404 was entered into on or about February 22, 1974.

7. Admits the allegations of paragraph Twentieth of intervenor-defendant's counterclaim, except that contract number DSA 120-73-D-1769 was entered into on or about January 22, 1973.

8. Admits the allegations of paragraph Twenty-first of intervenor-defendant's counterclaim.

9. Admits the allegations of paragraph Twenty-second of intervenor-defendant's counterclaim.

10. Admits the allegations of paragraph Twenty-third of intervenor-defendant's counterclaim.

11. Admits the allegations of paragraph Twenty-fourth of intervenor-defendant's counterclaim.

12. Denies the allegations of paragraph Twenty-fifth of intervenor-defendant's counterclaim, but admits that a letter sent under date of August 26, 1974 from Elmer B. Staats to Richard L. Gelb, President and Chief Executive Officer of plaintiff, which letter is attached hereto as Exhibit 1 and is self-explanatory of its content.

13. Admits the allegations of the first sentence of paragraph Twenty-sixth of intervenor-defendant's counterclaim. Denies the allegations of the second sentence of said paragraph and relies on the letter dated March 18, 1975, from plaintiff's counsel to defendant Staats, attached as Exhibit 2 hereto.

14. Admits that it has records of certain costs but otherwise denies the allegations of paragraph Twenty-seventh of intervenor-defendant's counterclaim.

15. Denies the allegations of paragraph Twenty-eighth of intervenor-defendant's counterclaim.

16. Denies the allegations of paragraph Twenty-ninth of intervenor-defendant's counterclaim.

AS AND FOR A SEPARATE DEFENSE

17. Intervenor-defendant's counterclaim fails to state a claim upon which relief may be granted.

WHEREFORE, plaintiff prays that this Court issue an order dismissing intervenor-defendant's counterclaim and granting such other and further relief as may be just.

Respectfully submitted,

WEIL, LEE & BERGIN

By /s/ _____

GILBERT H. WEIL
Attorneys for Plaintiff
Office and P.O. Address
60 East 42nd Street
New York, New York 10017
(212) 687-8573

COMPTROLLER GENERAL OF THE
UNITED STATES
WASHINGTON, D.C. 20548

B-146857 August 26, 1974

Mr. Richard L. Gelb
President and Chief Executive Officer
Bristol Laboratories
Division of Bristol-Myers Company
345 Park Avenue
New York, New York 10022

Dear Mr. Gelb:

As you know, because of the increasing Federal involvement in the procurement of pharmaceuticals, the General Accounting Office has underway a review of the procurement of drugs by agencies of the Federal Government, including the pricing of drugs and pharmaceuticals procured under negotiated contracts. This examination is being conducted at several drug companies, including Bristol Laboratories Division, Bristol-Myers Company, and is being made pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), the Accounting and Auditing Act of 1950 (31 U.S.C. 67), and the authority of the Comptroller General to examine contractors' records under the contract provisions pursuant to 10 U.S.C. 2313(b) and 41 U.S.C. 254(c).

For some time we have been attempting to gain access to records we consider necessary to conduct such a review. In this regard, in June 1973 we met with representatives of the Pharmaceutical Manufacturers Association and six drug firms to initiate a comprehensive review using data provided on a voluntary basis by representative industry firms. However, the industry firms have not provided us access to the records necessary to satisfactorily carry out our statutory responsibilities.

On a number of occasions since this effort was initiated, representatives of the drug industry have questioned our right to access to necessary records on the grounds that (1) our request for cost data was considered inappropriate

because the contracts were negotiated on the basis of standard catalog prices without regard to cost or profit margins; (2) the records apply basically to non-Government work; and (3) disclosure of cost data would be of benefit to competitors and damage the company if publicly disclosed. Our Office's right of access to such records was clearly decided by the courts in *Hewlett-Packard Company* v. *United States*, 385 F.2d 1013 (9th Cir. 1967), cert. denied 390 U.S. 988 (1968). The Hewlett-Packard case involved all of the issues the industry has raised.

The purpose of this letter is to formally request that cost records pertinent to contracts listed on enclosure 1 be made available for our examination as provided by the terms of the negotiated contracts awarded to your company by the Defense Supply Agency and the Veterans Administration. We must request that you have the responsible officials at Bristol Laboratories make available to the General Accounting Office as required, all books, documents, papers, and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests. For your information, statements from the legislative history pertaining to the "Examination of Records" clause included in the contracts and our position on the duties and responsibilities that the clause imposes upon my Office are presented in enclosure 2.

We request also that you advise us within 15 days with respect to your decision to make these records available for our examination.

Sincerely yours,

/s/ _____

ELMER B. STAATS
Comptroller General of the United States

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ENCLOSURE 2

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The cited clauses (Clause 10 of the Standard Form 32) were included in the contracts pursuant to Public Law 245, Eighty-second Congress, 65 Stat. 700, which amended section 4 of the Armed Service Procurement Act of 1947 (codified as 10 U.S.C. 2313) and section 304 of the Federal Property and Administrative Services Act of 1949 (codified as 41 U.S.C. 254(c)) by adding the following subsection:

> "(c) All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts."

Senate Report 603, Eighty-second Congress, to accompany Senate bill 921, which was later enacted as Public Law 245, explained the purpose of the legislation as follows:

> "The Federal Property and Administrative Services Act of 1949 and the Armed Services Procurement Act of 1947 are general legislation of permanent application to a very large percentage of Government procurement. They authorize negotiation of contracts without advertising under certain specified circumstances in the discretion of the agency head. Since it

> is well recognized that negotiated contracts are at the same time effective procurement instrumentalities under special circumstances, and require close supervision and control, this legislation would make examination by the Comptroller General a permanent part of procurement procedure on a basis of extending the examination provisions added to the First War Powers Act by Public Law 921 of the Eighty-first Congress."

In considering the legislation, the following statement was made on the floor of the House of Representatives by Congressman Hardy on October 15, 1951 (97 Cong. Rec. 13197):

> "This brings up another point. As I have indicated, the authority contained in this bill is really only necessary to cover those cases where the contractors refuse to permit the General Accounting Office to inspect their books and records. As I have already pointed out, the vast majority of contractors do make their books available on a voluntary basis when requested. Thus, this bill would affect that comparative few contractors who now refuse the agent of the Congress permission to see their records. It would be compulsory upon them. It seems logical to me to suppose that there is greater need for the GAO to see the records of those few who do not wish to make them available on a voluntary basis than it is to see the records of those who readily comply. To put it bluntly, those with nothing to hide have nothing to fear by opening their books to the General Accounting Office."

The language of the act and of the legislative history clearly establishes that the statutory provision was enacted to make possible the close supervision and control over negotiated procurements which the Congress regarded as necessary in the interest of the Government. This purpose requires that the act, and the contract provision which is almost identical in language, be interpreted to permit such detailed examination of the contractor's records to assure the necessary degree of supervision and control. In other words, the clear intent of the statute was

to provide for the examination by our Office of such of the contractor's records as would permit a valid evaluation of the reasonableness of the prices charged. This is clearly established by further remarks made by Congressman Hardy on the floor of the House of Representatives immediately after those quoted above (97 Cong. Rec. 13198) as follows:

> "In normal times, competitive bidding generally operates as a brake on the price which a contractor can demand from the Government for his goods and services. However, these are not normal times, and it should be obvous to all of us concerned with the expenditure of billions of dollars for national defense that we must establish every reasonable safeguard against waste and extravagance in the spending of these vast sums. Under conditions as they now exist, competitive bidding has little or no effect upon contracts which are negotiated without advertising. As a result, when a contract is being negotiated, here is a typical illustration of what usually happens: A contractor with years of experience comes to the conference table accompanied by a highly competent accountant and equally competent lawyer. The Government representative on the other side of the table will, in a great majority of cases, be at a tremendous disadvantage, from the standpoint of both training and experience, no matter how conscientious and honest he may be. So, aside from any intentional liberality on the part of the Government contracting officer, there is every chance in the world that the Government will come out on the short end of the deal. *This bill would at least enable the agent of the Congress to check the transactions, both from the Government records and the contractor's books.*" (Emphasis supplied.)

The language of the access to records clauses included in the pertinent agreements is modeled closely after the statutory language and was undoubtedly intended to be coextensive in scope. Therefore, we must adhere to the position stated earlier that under the contracts we are authorized to examine such of the contractor's records as

would permit a valid evaluation of the reasonableness of the prices charged without regard to the factors considered or ignored by the contractor in establishing those prices.

Even though other factors are considered in establishing the prices for drugs furnished to the Government and the prices established for may not be directly proportionate to costs, costs of production nevertheless directly pertain to, and involve transactions related to, the contract. Although it is not a condition to the legal authority of the General Accounting Office to have access to such records, we believe that cost records are directly pertinent to the prices established. We believe also that an examination of the relationship of experienced and estimated costs to the prices paid by the Government, and of the pricing methods used in establishing the prices, is clearly within the scope of the type of examination contemplated and required by the terms of the contract.

It is our position, consistent with our interpretation of the act and the contract provision, (1) that all books, documents, papers, and other records relating to the pricing and cost of performance of negotiated contracts are records relating directly to the contracts and to the Government's financial interest, (2) that such books, documents, papers, and other records, are not limited to the formal cost accounting records and their supporting data, but include all underlying data concerning contract activities and operations which afford the basis for, or are involved in any way with, the incurrence of costs by the contractor, (3) that the cost records which we requested and other data supporting the prices charged to the Government by the contractor are directly pertinent to the contracts, and (4) that therefore all such books, documents, papers, and other records and underlying data are subject to examination by the General Accounting Office under its statutory responsibility and authority to examine activities and related costs under negotiated contracts.

March 18, 1975

Hon. Elmer B. Staats
Comptroller General of the
United States
Washington, D.C. 20548

Re: *Your #B-146857*

Dear Sir:

On behalf of our client, Bristol-Myers Company, we wish to thank you for the opportunity extended by your letter of March 6, 1975 to Mr. Richard L. Gelb to restate clearly our client's position, and its rationale, respecting your request referred to in that letter.

We do not, nor have we ever, disputed your rights of access and examination under our contracts to all books, documents, papers, and records that are *directly* pertinent to and involve those transactions which determined the prices set in such contracts (please see our letters to you of September 13, 1974 and to Mr. Gregory J. Ahart of November 18, 1974).

Conversely, in our opinion books, documents, papers, or records pertinent to and involving transactions which established the prices in *other* contracts with *other* persons, but which do not take place and were not operant factors with respect to the contracts you have listed are not pertinent to, and do not involve transactions relating to such contracts.

It is, therefore, our position that the terms of our contracts protect such books, documents, papers, and records against access and examination.

Having little doubt that you disagree with Bristol-Myers' decision, we believe it best that the matter be judicially resolved as expeditiously as possible. We, therefore enclose a courtesy copy of a complaint we are filing this

day in the District Court for the Southern District of New York.

RESPECTFULLY YOURS,

GHW
GHW:rb
Enclosure

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 75 CIV 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT,

AND

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

NOTICE OF MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56, F.R.C.P.

SIRS:

PLEASE TAKE NOTICE that, upon the annexed statement of material facts as to which there is no genuine issue to be tried, the accompanying affidavit of Gilbert H. Weil, dated July 22, 1975, the pleadings herein, defendant Staats' answers to plaintiff's first set of interrogatories and the accompanying memorandum, plaintiff will move this Court at room 2903, United States Courthouse, Foley Square, New York, New York, on the 1st day of August, 1975 at 10:00 o'clock in the forenoon, for an order that plaintiff is entitled to judgment as a matter of law (1) limiting defendant Staats' access to and examination of plaintiff's books, documents, papers and records, in accordance with 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) and various contracts between plaintiff and the United States, to those records which are directly pertinent to and involve transactions related to such contracts, (2) prohibiting defendant Staats from gaining access to and conducting an examination of plaintiff's books, documents, papers or rec-

ords which are pertinent to and involve transactions related only to contracts other than the aforesaid contracts and (3) dismissing intervenor-defendant's counterclaim except to the extent that it properly seeks access to and examination of those of plaintiff's books, documents, papers and records which are directly pertinent to and involve transactions related to the said government contracts.

GROUNDS FOR MOTION

1. Within the past three years, plaintiff entered into a number of contracts with the United States for the sale of certain pharmaceutical products. Each of those contracts contained a provision permitting defendant Staats to examine such records of plaintiff as are directly pertinent to and involve transactions related to such contracts. Defendant Staats has insisted on access to and examination of records of plaintiff that pertain to and involve transactions related only to contracts other than those with the United States.

2. Intervenor-defendant has filed a counterclaim asking that plaintiff be enjoined from refusing to give access to and to permit examination of those of its records demanded by defendant Staats. Such counterclaim has no legal basis under contract or statutory law insofar as it requires plaintiff to produce records that are not directly pertinent to and do not involve transactions related to the subject contracts.

Yours, etc.
WEIL, LEE & BERGIN

By _____

GILBERT H. WEIL
Attorneys for Plaintiff
Office and P.O. Address
60 East 42nd Street
New York, New York 10017
(212) 687-8573

TO: NAOMI REICE BUCHWALD
Assistant U. S. Attorney
U. S. Courthouse Annex
Room 526
One St. Andrews Plaza
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No.
75 CIV 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF
BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF
THE UNITED STATES, DEFENDANT,

AND

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

STATEMENT UNDER LOCAL RULE 9(g)

STATEMENT OF THE MATERIAL FACTS AS TO WHICH THERE ARE NO GENUINE ISSUES

The following is a statement of the material facts as to which plaintiff contends there is no genuine issue to be tried.

1. On or about January 22, 1973, plaintiff entered into a contract with the Defense Personnel Support Center, Defense Supply Agency, for the sale of certain pharmaceutical products. Said contract is identified as DSA 120-73-D-1769.

2. On or about March 29, 1973, plaintiff entered into a contract with the Veterans Administration, Marketing Division, Drugs & Chemicals, for the sale of certain pharmaceutical products. Said contract is identified as V797P-5929b.

3. On or about February 22, 1974, plaintiff entered into a contract with the Defense Personnel Support Center, Defense Supply Agency, for the sale of certain pharmaceutical products. Said contract is identified as DSA 120-74-C-2404.

4. On or about March 29, 1974, plaintiff entered into a contract with the Defense Personnel Support Center, Defense Supply Agency, for the sale of certain pharmaceutical products. Said contract is identified as DSA 120-74-C-2724.

5. Each of the aforementioned contracts had incorporated therein a clause that provided, in part:

> "(b) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under this contract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.
>
> "(c) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under the subcontract of such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (i) purchase orders not exceeding $2,500 (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public."

6. The aforementioned contracts were not entered into by means of formal advertising.

7. In a letter dated August 26, 1974 from defendant Staats to Mr. Richard L. Gelb, President and Chief Executive Officer of plaintiff, defendant formally requested that plaintiff make available for examination by defendant all records of costs directly pertinent to the subject contracts, but did not limit his request to records of expenses incurred for the items sold under those contracts. Exhibit A to moving (Weil) affidavit.

8. By letter dated September 13, 1974, from Douglas R. Purdy, Vice-President of plaintiff, to defendant Staats, plaintiff agreed to make available at its Syracuse office those cost records deemed to be pertinent to the subject contracts. Weil aff't, Exh.B.

9. In a letter dated November 18, 1974, from Mr. Purdy to Gregory J. Ahart, Director, Manpower and Welfare Division, United States General Accounting Office, plaintiff agreed to make available in February 1975, for examination by defendant Staats' representatives, those of its records that are directly pertinent to the subject contracts. Weil aff't, Exh. C.

10. On or about February 10 and 11, 1975, representatives of defendant Staats met with representatives of plaintiff in the latter's offices in Syracuse, New York. Although plaintiff made available for examination by defendant Staats' representatives those records it felt are directly pertinent to the subject contracts, said records were deemed incomplete by defendant Staats' representatives.

11. Under date of March 6, 1975, defendant Staats, in a letter to Mr. Richard L. Gelb, informed plaintiff that if it did not comply within 10 days with his formal request of August 26th, he would take "such action deemed appropriate." Weil aff't, Exh. D.

12. By letter of March 18, 1975, Gilbert H. Weil, counsel to plaintiff, restated plaintiff's position of willingness to

comply with its statutory and contractual obligations. Weil aff't, Exh. E.

Yours, etc.
WEIL, LEE & BERGIN
By /s/_____
GILBERT H. WEIL
Attorneys for Plaintiff
Office and P.O. Address
60 East 42nd Street
New York, New York 10017
(212) 687-6573

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 75 CIV 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF
BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL
OF THE UNITED STATES, DEFENDANT,

AND

UNITED STATES OF AMERICA,
INTERVENOR-DEFENDANT.

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GILBERT H. WEIL, being duly sworn, deposes as follows:

1. I am a member of the bar of this Court and, as counsel for the plaintiff Bristol Laboratories Division of Bristol-Myers Company, make this affidavit in support of said plaintiff's motion for summary judgment.

2. The purpose of this affidavit is to bring before the court the following exhibits annexed hereto:

Exhibit A. A letter of August 26, 1974, from defendant Staats to Mr. Richard L. Gelb, President and Chief Executive Officer of plaintiff, formally requesting plaintiff to make available all records directly pertinent to the subject contracts, but not limiting said request to expenses incurred for the items sold under those contracts.

Exhibit B. A letter of September 13, 1974, from Mr. Douglas R. Purdy, Vice-President of plaintiff, to defendant Staats, indicating plaintiff's willingness to make available for examination those cost records deemed to be pertinent to the subject contracts.

Exhibit C. A letter of November 18, 1974, from Mr. Purdy to Mr. Gregory J. Ahart, Director, Manpower and Welfare Division, United States General Accounting Office, agreeing to a meeting at plaintiff's offices in Syracuse, New York for the examination by defendant Staats' representatives of those of plaintiff's records that are directly pertinent to the subject contracts.

Exhibit D. A letter of March 6, 1975, from defendant Staats to Richard L. Gelb, threatening to take "appropriate" action against plaintiff if it did not comply with the formal request of August 26th.

Exhibit E. A letter of March 18, 1975, from affiant, as counsel to plaintiff, to defendant Staats, restating plaintiff's position of willingness to comply with the statutes and the contracts.

Exhibit F. A copy of defendant Staats' answers to plaintiff's first set of interrogatories, preceded in each instance by plaintiff's request.

3. Exhibits A, B, C and D, above, are submitted on information and belief, affiant having no direct knowledge thereof, beyond plaintiff's representations to him.

4. The effect of these exhibits is, as will be more fully described in plaintiff's accompanying memorandum in support of its motion for summary judgment, to show the court that there are no issues of fact raised by plaintiff's said motion.

5. The foregoing exhibits, especially D, E and F, set forth the history and the focus of the controversy herein.

6. The sole issue raised by the within motion, namely, the determination of the scope of the statutes and contracts granting to defendant Staats the right of access to and examination of those of plaintiff's records which are

directly pertinent to and involve transactions related to the subject contracts, is a question of law.

/s/ _____
GILBERT H. WEIL

Sworn to before me this 22nd day of July 1975.

/s/ _____
Notary Public

COMPTROLLER GENERAL OF THE
UNITED STATES
WASHINGTON, D.C. 20548

B-146857 August 26, 1974

Mr. Richard L. Gelb
President and Chief Executive Officer
Bristol Laboratories
Division of Bristol-Myers Company
345 Park Avenue
New York, New York 10022

Dear Mr. Gelb:

As you know, because of the increasing Federal involvement in the procurement of pharmaceuticals, the General Accounting Office has underway a review of the procurement of drugs by agencies of the Federal Government, including the pricing of drugs and pharmaceuticals procured under negotiated contracts. This examination is being conducted at several drug companies, including Bristol Laboratories Division, Bristol-Myers Company, and is being made pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), the Accounting and Auditing Act of 1950 (31 U.S.C. 67), and the authority of the Comptroller General to examine contractors' records under the contract provisions pursuant to 10 U.S.C. 2313(b) and 41 U.S.C. 254(c).

For some time we have been attempting to gain access to records we consider necessary to conduct such a review. In this regard, in June 1973 we met with representatives of the Pharmaceutical Manufacturers Association and six drug firms to initiate a comprehensive review using data provided on a voluntary basis by representative industry firms. However, the industry firms have not provided us access to the records necessary to satisfactorily carry out our statutory responsibilities.

On a number of occasions since this effort was initiated, representatives of the drug industry have questioned our

EXHIBIT A

right to access to necessary records on the grounds that (1) our request for cost data was considered inappropriate because the contracts were negotiated on the basis of standard catalog prices without regard to cost or profit margins; (2) the records apply basically to non-Government work; and (3) disclosure of cost data would be of benefit to competitors and damage the company if publicly disclosed. Our Office's right of access to such records was clearly decided by the courts in *Hewlett-Packard Company* v. *United States*, 385 F.2d 1013 (9th Cir. 1967), cert. denied 390 U.S. 988 (1968). The Hewlett-Packard case involved all of the issues the industry has raised.

The purpose of this letter is to formally request that cost records pertinent to contracts listed on enclosure 1 be made available for our examination as provided by the terms of the negotiated contracts awarded to your company by the Defense Supply Agency and the Veterans Administration. We must request that you have the responsible officials at Bristol Laboratories make available to the General Accounting Office as required, all books, documents, papers, and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests. For your information, statements from the legislative history pertaining to the "Examination of Records" clause included in the contracts and our position on the duties and responsibilities that the clause imposes upon my Office are presented in enclosure 2.

We request also that you advise us within 15 days with respect to your decision to make these records available for our examination.

Sincerely yours,

/s/ _____

ELMER B. STAATS
Comptroller General
of the United States

Enclosures—2

ENCLOSURE 1

LISTING OF CONTRACTS
AND, WHERE APPROPRIATE,
PURCHASE (DELIVERY) ORDERS
TRANSACTED BETWEEN THE
U.S. GOVERNMENT AND BRISTOL LABORATORIES

CONTRACT NUMBER	*DATE*
VETERANS ADMINISTRATION:	
V797P-5929b	Mar. 29, 1973
PURCHASE ORDERS:	
74-MC-50116	Sept. 11, 1973
74-MC-50498	Mar. 20, 1974
74-MC-50038	July 26, 1973
74-MC-50490	April 27, 1973
74-MC-50229	Nov. 9, 1973
74-MC-50166	Oct. 15, 1973
74-MC-50153	Sept. 27, 1973
74-MC-50073	Aug. 16, 1973
74-MC-50046	July 31, 1973
74-MC-50341	Jan. 10, 1974
74-MC-50438	Feb. 21, 1974
74-MC-50399	Jan. 29, 1974
74-MC-50307	Dec. 14, 1973
74-MC-50248	Nov. 20, 1973
DEPARTMENT OF DEFENSE:	
DSA120-74-C-2724	Mar. 29, 1974
DSA120-74-C-2404	Feb. 22, 1974
DSA120-73-D-1769	Jan. 22, 1973
DELIVERY ORDERS:	
0001	Jan. 29, 1973
0002	Mar. 16, 1973
0003	Apr. 20, 1973
0005	May 22, 1973
0006	June 15, 1973
0007	July 3, 1973
0008	Aug. 13, 1973
0009	Aug. 30, 1973
0010	Sept. 6, 1973
0011	Oct. 10, 1973

CONTRACT NUMBER	*DATE*
DELIVERY ORDERS:	
0012	Oct. 25, 1973
0013	Jan. 3, 1974
0014	Jan. 8, 1974
0015	Jan. 15, 1974
0016	Jan. 18, 1974

ENCLOSURE 2

LEGISLATIVE HISTORY AND THE GENERAL ACCOUNTING OFFICE POSITION PERTAINING TO THE EXAMINATION OF RECORDS' CLAUSES

The cited clauses (Clause 10 of the Standard Form 32) were included in the contracts pursuant to Public Law 245, Eighty-second Congress, 65 Stat. 700, which amended section 4 of the Armed Service Procurement Act of 1947 (codified as 10 U.S.C. 2313) and section 304 of the Federal Property and Administrative Services Act of 1949 (codified as 41 U.S.C. 254(c)) by adding the following subsection:

> "(c) All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts."

Senate Report 603, Eighty-second Congress, to accompany Senate bill 921, which was later enacted as Public Law 245, explained the purpose of the legislation as follows:

> "The Federal Property and Administrative Services Act of 1949 and the Armed Services Procurement Act of 1947 are general legislation of permanent application to a very large percentage of Government

procurement. They authorize negotiation of contracts without advertising under certain specified circumstances in the discretion of the agency head. Since it is well recognized that negotiated contracts are at the same time effective procurement instrumentalities under special circumstances, and require close supervision and control, this legislation would make examination by the Comptroller General a permanent part of procurement procedure on a basis of extending the examination provisions added to the First War Powers Act by Public Law 921 of the Eighty-first Congress."

In considering the legislation, the following statement was made on the floor of the House of Representatives by Congressman Hardy on October 15, 1951 (97 Cong. Rec 13197):

"This brings up another point. As I have indicated, the authority contained in this bill is really only necessary to cover those cases where the contractors refuse to permit the General Accounting Office to inspect their books and records. As I have already pointed out, the vast majority of contractors do make their books available on a voluntary basis when requested. Thus, this bill would affect that comparative few contractors who now refuse the agent of the Congress permission to see their records. It would be compulsory upon them. It seems logical to me to suppose that there is greater need for the GAO to see the records of those few who do not wish to make them available on a voluntary basis than it is to see the records of those who readily comply. To put it bluntly, those with nothing to hide have nothing to fear by opening their books to the General Accounting Office."

The language of the act and of the legislative history clearly establishes that the statutory provision was enacted to make possible the close supervision and control over negotiated procurements which the Congress regarded as necessary in the interest of the Government. This purpose requires that the act, and the contract provision which is almost identical in language, be interpreted to permit such detailed examination of the contractor's

records to assure the necessary degree of supervision and control. In other words, the clear intent of the statute was to provide for the examination by our Office of such of the contractor's records as would permit a valid evaluation of the reasonableness of the prices charged. This is clearly established by further remarks made by Congressman Hardy on the floor of the House of Representatives immediately after those quoted above (97 Cong. Rec. 13198) as follows:

> "In normal times, competitive bidding generally operates as a brake on the price which a contractor can demand from the Government for his goods and services. However, these are not normal times, and it should be obvious to all of us concerned with the expenditure of billions of dollars for national defense that we must establish every reasonable safeguard against waste and extravagance in the spending of these vast sums. Under conditions as they now exist, competitive bidding has little or no effect upon contracts which are negotiated without advertising. As a result, when a contract is being negotiated, here is a typical illustration of what usually happens: A contractor with years of experience comes to the conference table accompanied by a highly competent accountant and equally competent lawyer. The Government representative on the other side of the table will, in a great majority of cases, be at a tremendous disadvantage, from the standpoint of both training and experience, no matter how conscientious and honest he may be. So, aside from any intentional liberality on the part of the Government contracting officer, there is every chance in the world that the Government will come out on the short end of the deal. *This bill would at least enable the agent of the Congress to check the transactions, both from the Government records and the contractor's books.*" (Emphasis supplied.)

The language of the access to records clauses included in the pertinent agreements is modeled closely after the statutory language and was undoubtedly intended to be coextensive in scope. Therefore, we must adhere to the position stated earlier that under the contracts we are au-

thorized to examine such of the contractor's records as would permit a valid evaluation of the reasonableness of the prices charged without regard to the factors considered or ignored by the contractor in establishing those prices.

Even though other factors are considered in establishing the prices for drugs furnished to the Government and the prices established for may not be directly proportionate to costs, costs of production nevertheless directly pertain to, and involve transactions related to, the contract. Although it is not a condition to the legal authority of the General Accounting Office to have access to such records, we believe that cost records are directly pertinent to the prices established. We believe also that an examination of the relationship of experienced and estimated costs to the prices paid by the Government, and of the pricing methods used in establishing the prices, is clearly within the scope of the type of examination contemplated and required by the terms of the contract.

It is our position, consistent with our interpretation of the act and the contract provision, (1) that all books, documents, papers, and other records relating to the pricing and cost of performance of negotiated contracts are records relating directly to the contracts and to the Government's financial interest, (2) that such books, documents, papers, and other records are not limited to the formal cost accounting records and their supporting data, but include all underlying data concerning contract activities and operations which afford the basis for, or are involved in any way with, the incurrence of costs by the contractor, (3) that the cost records which we requested and other data supporting the prices charged to the Government by the contractor are directly pertinent to the contracts, and (4) that therefore all such books, documents, papers, and other records and underlying data are subject to examination by the General Accounting Office under its statutory responsibility and authority to examine activities and related costs under negotiated contracts.

BRISTOL LABORATORIES
DIVISION OF BRISTOL-MYERS COMPANY
SYRACUSE, NEW YORK 13201

D. R. PURDY
VICE PRESIDENT

September 13, 1974

Mr. Elmer B. Staats
Comptroller General of the United States
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Staats:

This letter is in reply to the letter, dated August 26, 1974, from you to Mr. Richard L. Gelb, President of Bristol-Myers Company, requesting formally that Bristol Laboratories Division make available for examination certain cost records pertinent to contracts listed on Enclosure I of your letter.

We wish to advise that it is agreeable to the Company to make available for examination at our Syracuse office those cost records deemed to be pertinent to said contracts. However, prior to any visit of your staff to Syracuse for this purpose, we respectfully request an opportunity to meet and discuss with you or your representatives the methods and procedures to be followed in connection with such examination. As I related to Mr. Gregory J. Ahart, Director Manpower & Welfare Division, in my letter of June 7, 1974, our staff is rather limited at the present time and we seek to arrange for the smooth conduct of the examination.

We will be available at your convenience for such a meeting and we look forward to hearing from you or your representative in this regard.

VERY TRULY YOURS,

/s/ _____

DOUGLAS R. PURDY
Vice President
Bristol Laboratories Division

DRP:lb

EXHIBIT B

November 18, 1974

Mr. Gregory J. Ahart
Director
Manpower and Welfare Division
United States General Accounting Office
Washington, D.C. 20548

Dear Greg:

I should like to confirm what I explained to you over the telephone today. We have given serious consideration to your proposal for a "Phase II" type study of the pharmaceutical industry and have concluded that we will not participate in such an effort. Although some mutual benefit might have resulted from our involvement, we believe that it would have entailed considerable effort on our part at a time when our staff is stretched very thin. Furthermore, we believe that it would involve access to details of our business which are truly confidential, and you have made it clear that you cannot guarantee that confidentiality would be maintained.

As I stated in my letter to Mr. Staats, dated September 13, 1974, we are agreeable to an examination of cost records deemed pertinent to the contracts enumerated in his letter of August 26 to Mr. Gelb, President of Bristol-Myers Company. You are aware that we are, at this time, involved with audits by the Internal Revenue Service, the Customs Bureau and our external auditors—Messrs. Price, Waterhouses and Company. We wish to cooperate with you, but you can appreciate the strain which all of these projects place upon our organization.

In order to best facilitate the work of your auditors as well as to minimize confusion for my staff I should like to suggest that your examination commence after our year-end closing—say about February 1.

EXHIBIT C

Of course, if you wish to meet before that date to discuss procedures and scope, I am sure that can be arranged.

VERY TRULY YOURS,
/s/ _____
D. R. PURDY

DRP:lb

COMPTROLLER GENERAL OF
THE UNITED STATES
WASHINGTON, D.C. 20548

B-146857 March 6, 1975

Mr. Richard L. Gelb
President and Chief Executive Officer
Bristol-Myers Company
345 Park Avenue
New York, New York 10022

Dear Mr. Gelb:

In a letter dated August 26, 1974, I formally requested that Bristol Laboratories Division of Bristol-Myers Company make available to our Office for examination all books, documents, papers and other records pertinent to several specified Government contracts.

Following additional contacts between your firm and our Office, Mr. D. R. Purdy, Vice President, Bristol Laboratories Division, in a letter dated November 18, 1974, informed Mr. Gregory J. Ahart, Director of our Manpower and Welfare Division, that your firm was agreeable to an examination of cost records deemed pertinent to the contracts cited in my letter of August 26, 1974. Mr. Purdy requested that our examination begin about February 1, 1975, and arrangements were made for our examination to begin on February 10, 1975.

On February 10 and 11, 1975, representatives of our Office met with Mr. Purdy and other Bristol representatives in Syracuse, New York, to begin the examination of records. During this visit, the Bristol representatives stated that the firm was willing to make available for our examination and vertification, (1) Bristol's contract files which included shipment and invoice records, (2) records and data relating to manufacturing costs assigned by the firm to the products purchased under the contracts, and (3) Bristol's product prices to its non-Federal customers.

EXHIBIT D

The representatives stated, however, that Bristol was unwilling to make available for our review, records concerning costs incurred for activities such as research and development, marketing and promotion, distribution and administration. According to the representatives, such costs are not assigned to individual products and records concerning these costs are not pertinent to the cited contracts. The representatives stated also that Bristol did not consider as pertinent to the contracts, records relating to the methodology and decisions involved in the firm's establishment of prices for the products purchased under the contracts.

We believe that your firm's position regarding our request for access to records pertinent to specified contracts does not meet the requirements of the statutes under which our request was made. In addition, we believe that in the absence of access to the data which your firm is not presently inclined to provide us, we cannot appropriately meet our statutory responsibilities to the Congress.

We therefore have concluded that in the absence of access to such data, we must interpret your firm's actions as a refusal of our formal request for access to records pertinent to the cited contracts. If you believe that we have misinterpreted your firm's position, we request that you so inform us within 10 days and advise us of the date when it would be convenient for us to commence our review of your firm's records.

In the absence of a response from your firm indicating that we have misinterpreted your firm's position concerning this matter, we will be required to take such action deemed appropriate to the exercise of our rights under the contracts and the execution of our statutory responsibilities.

Sincerely yours,

/s/ _____

ELMER B. STAATS
Comptroller General
of the United States

March 18, 1975

Hon. Elmer B. Staats
Comptroller General of the
United States
Washington, D. C. 20548

Re: *Your #B-146857*

Dear Sir:

On behalf of our client, Bristol-Myers Company, we wish to thank you for the opportunity extended by your letter of March 6, 1975 to Mr. Richard L. Gelb to restate clearly our client's position, and its rationale, respecting your request referred to in that letter.

We do not, nor have we ever, disputed your rights of access and examination under our contracts to all books, documents, papers, and records that are *directly* pertinent to and involve those transactions which determined the prices set in such contracts (please see our letters to you of September 13, 1974 and to Mr. Gregory J. Ahart of November 18, 1974).

Conversely, in our opinion books, documents, papers, or records pertinent to and involving transactions which established the prices in *other* contracts with *other* persons, but which did not take place and were not operant factors with respect to the contracts you have listed are not pertinent to, and do not involve transactions relating to such contracts.

It is, therefore, our position that the terms of our contracts protect such books, documents, papers, and records against access and examination.

Having little doubt that you disagree with Bristol-Myers' decision, we believe it best that the matter be judicially resolved as expeditiously as possible. We, therefore, enclose a courtesy copy of a complaint we are filing this day in the District Court for the Southern District of New York.

Respectfully yours,

GHW:rb
Enclosure

EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MEYERS COMPANY, PLAINTIFF,

-*v*-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT.

DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

The defendant, Elmer B. Staats, Comptroller General of the United States, by James D. Martin, makes the following answers to written interrogatories served by plaintiff on May 30, 1975.

Plaintiff's Interrogatory No. 1

"1. Identify or describe, as specifically and precisely as possible, each separate book, document, paper or record of the plaintiff to which the defendant claims a right of access and examination."

Answer to Interrogatory No. 1

Defendant does not have knowledge or information sufficient to respond to this interrogatory and accordingly avails itself of the alternative proposed by plaintiff and responds to Interrogatory No. 2.

Plaintiff's Interrogatory No. 2

"2. If defendant cannot thus identify or describe a particular book, document, paper or record, then specify it by

designating its generic type and nature of subject content."

Answer to Interrogatory No. 2

Defendant maintains that its right of access and examination includes, but is not limited to the following categories of records:

(a) Records relating to those costs assigned by plaintiff to the products purchased under the subject contracts, which industry representatives have indicated are limited essentially to manufacturing costs.

(b) Records relating to those costs which, although they are incurred during the course of plaintiff's activities relating to the supply of ethical pharmaceuticals (including those purchased under subject contracts), are not assigned by the firm to individual products. These costs would include those incurred for activities such as research and development, marketing and promotion, distribution and administration.

(c) Records relating to the methodology, and decisions involved in plaintiff's establishment of prices for the products purchased under the subject contracts.

(d) Records required to verify, to the extent deemed necessary, all data obtained during the course of any review conducted.

However, because of the need to verify all data and because General Accounting Office (GAO) representatives have been provided only very limited access to records by plaintiff, it is not feasible to identify more precisely the specific records needed to be obtained and examined in order to conduct our review.

Plaintiff's Interrogatory No. 3

"3. With respect to each such particular or class of book, document, paper or record identified in response to Interrogatories 1 and 2 above:

A. Name and describe fully:

(1) the specific nature of the transaction or transactions which defendant claims such book, document, paper or record (a) involves and (b) is directly pertinent to; and

(2) the manner and respects in which, and the reasons why, defendant claims each such book, document, paper or record does involve and is directly pertinent to each such transaction.

B. Identify each contract or subcontract to which defendant claims each transaction referred to in Interrogatory 3A(1) relates."

Answer to Interrogatory No. 3

The transactions involved are transactions which relate to the contracts between plaintiff and the Veterans Administration and the Department of Defense, specified in the letter of August 26, 1974, from Elmer B. Staats, Comptroller General of the United States, to Richard Gelb, President and Chief Executive Officer of Plaintiff which is annexed hereto as Exhibit A and made a part hereof. Because of the limited access afforded GAO's representatives to the records of the plaintiff, it is not possible to identify the specific transactions to which a particular book, document, paper or record is directly pertinent or with which it is involved.

Beyond the answer herein provided, this interrogatory is objected to on the grounds set forth in the accompanying objections.

Dated: New York, New York

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the
United States of America

By: /s/_____
NAOMI REICE BUCHWALD
Assistant United States Attorney
Office & Post Office Address:
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1972

TO: WEIL, LEE & BERGIN
Attorneys for Plaintiff
Office and P. O. Address
60 East 42nd Street
New York, New York 10017
Telephone: (212) 687-8573

CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

James D. Martin being duly sworn, deposes and says:

I am, Deputy Director of the Manpower and Welfare Division of the General Accounting Office and have read the interrogatories served upon defendant by plaintiff and the foregoing answers or responses to those interrogatories are true according to the best of my information and belief.

/s/ _____
JAMES D. MARTIN

Subscribed and sworn to before me this 27 day of June 1975

/s/ Mary F. Webb
Notary Public

COMPTROLLER GENERAL OF THE
UNITED STATES
WASHINGTON, D.C. 20548

B-146857 August 26, 1974

Mr. Richard L. Gelb
President and Chief Executive Officer
Bristol Laboratories
Division of Bristol-Myers Company
345 Park Avenue
New York, New York 10022

Dear Mr. Gelb:

As you know, because of the increasing Federal involvement in the procurement of pharmaceuticals, the General Accounting Office has underway a review of the procurement of drugs by agencies of the Federal Government, including the pricing of drugs and pharmaceuticals procured under negotiated contracts. This examination is being conducted at several drug companies, including Bristol Laboratories Division, Bristol-Myers Company, and is being made pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), the Accounting and Auditing Act of 1950 (31 U.S.C. 67), and the authority of the Comptroller General to examine contractors' records under the contract provisions pursuant to 10 U.S.C. 2313(b) and 41 U.S.C. 254(c).

For some time we have been attempting to gain access to records we consider necessary to conduct such a review. In this regard, in June 1973 we met with representatives of the Pharmaceutical Manufacturers Association and six drug firms to initiate a comprehensive review using data provided on a voluntary basis by representative industry firms. However, the industry firms have not provided us

access to the records necessary to satisfactorily carry out our statutory responsibilities.

On a number of occasions since this effort was initiated, representatives of the drug industry have questioned our right to access to necessary records on the grounds that (1) our request for cost data was considered inappropriate because the contracts were negotiated on the basis of standard catalog prices without regard to cost or profit margins; (2) the records apply basically to non-Government work; and (3) disclosure of cost data would be of benefit to competitiors and damage the company if publicly disclosed. Our Office's right of access to such records was clearly decided by the courts in *Hewlett-Packard Company* v. *United States*, 385 F.2d 1013 (9th Cir. 1967), cert. denied 390 U.S. 988 (1968). The Hewlett-Packard case involved all of the issues the industry has raised.

The purpose of this letter is to formally request that cost records pertinent to contracts listed on enclosure 1 be made available for our examination as provided by the terms of the negotiated contracts awarded to your company by the Defense Supply Agency and the Veterans Administration. We must request that you have the responsible officials at Bristol Laboratories make available to the General Accounting Office as required, all books, documents, papers, and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests. For your information, statements from the legislative history pertaining to the "Examination of Records" clause included in the contracts and our position on the duties and responsibilities that the clause imposes upon my Office are presented in enclosure 2.

We request also that you advise us within 15 days with

respect to your decision to make these records available for our examination.

Sincerely yours,

/s/ _____

ELMER B. STAATS
Comptroller General
of the United States

Enclosures—2

LISTING OF CONTRACTS AND, WHERE APPROPRIATE, PURCHASE (DELIVERY) ORDERS TRANSACTED BETWEEN THE U.S. GOVERNMENT AND BRISTOL LABORATORIES

CONTRACT NUMBER	*DATE*
VETERANS ADMINISTRATION:	
V797P-5929b	Mar. 29, 1973
PURCHASE ORDERS:	
74-MC-50116	Sept. 11, 1973
74-MC-50498	Mar. 20, 1974
74-MC-50038	July 26, 1973
74-MC-50490	April 27, 1973
74-MC-50229	Nov. 9, 1973
74-MC-50166	Oct. 15, 1973
74-MC-50153	Sept. 27, 1973
74-MC-50073	Aug. 16, 1973
74-MC-50046	July 31, 1973
74-MC-50341	Jan. 10, 1974
74-MC-50438	Feb. 21, 1974
74-MC-50399	Jan. 29, 1974
74-MC-50307	Dec. 14, 1973
74-MC-50243	Nov. 20, 1973
DEPARTMENT OF DEFENSE:	
DSA120-74-C-2724	Mar. 29, 1974
DSA120-74-C-2404	Feb. 22, 1974
DSA120-73-D-1769	Jan. 22, 1973
DELIVERY ORDERS:	
0001	Jan. 29, 1973
0002	Mar. 16, 1973
0003	Apr. 20, 1973
0005	May 22, 1973
0006	June 15, 1973
0007	July 3, 1973
0008	Aug. 13, 1973
0009	Aug. 30, 1973
0010	Sept. 6, 1973

CONTRACT NUMBER	*DATE*
DELIVERY ORDERS:	
0011	Oct. 10, 1973
0012	Oct. 25, 1973
0013	Jan. 3, 1974
0014	Jan. 8, 1974
0015	Jan. 15, 1974
0016	Jan. 18, 1974

ENCLOSURE 2

LEGISLATIVE HISTORY AND THE GENERAL ACCOUNTING OFFICE POSITION PERTAINING TO THE EXAMINATION OF RECORDS' CLAUSES

The cited clauses (Clause 10 of the Standard Form 32) were included in the contracts pursuant to Public Law 245, Eighty-second Congress, 65 Stat. 700, which amended section 4 of the Armed Service Procurement Act of 1947 (codified as 10 U.S.C. 2313) and section 304 of the Federal Property and Administrative Services Act of 1949 (codified as 41 U.S.C. 254(c)) by adding the following subsection:

> "(c) All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts."

Senate Report 603, Eighty-second Congress, to accompany Senate bill 921, which was later enacted as Public Law 245, explained the purpose of the legislation as follows:

> "The Federal Property and Administrative Services Act of 1949 and the Armed Services Procurement

> Act of 1947 are general legislation of permanent application to a very large percentage of Government procurement. They authorize negotiation of contracts without advertising under certain specified circumstances in the discretion of the agency head. Since it is well recognized that negotiated contracts are at the same time effective procurement instrumentalities under special circumstances, and require close supervision and control, this legislation would make examination by the Comptroller General a permanent part of procurement procedure on a basis of extending the examination provisions added to the First War Powers Act by Public Law 921 of the Eighty-first Congress."

In considering the legislation, the following statement was made on the floor of the House of Representatives by Congressman Hardy on October 15, 1951 (97 Cong. Rec. 13197):

> "This brings up another point. As I have indicated, the authority contained in this bill is really only necessary to cover those cases where the contractors refuse to permit the General Accounting Office to inspect their books and records. As I have already pointed out, the vast majority of contractors do make their books available on a voluntary basis when requested. Thus, this bill would affect that comparative few contractors who now refuse the agent of the Congress permission to see their records. It would be compulsory upon them. It seems logical to me to suppose that there is greater need for the GAO to see the records of those few who do not wish to make them available on a voluntary basis than it is to see the records of those who readily comply. To put it bluntly, those with nothing to hide have nothing to fear by opening their books to the General Accounting Office."

The language of the act and of the legislative history clearly establishes that the statutory provision was enacted to make possible the close supervision and control over negotiated procurements which the Congress regarded as necessary in the interest of the Government. This purpose requires that the act, and the contract provi-

sion which is almost identical in language, be interpreted to permit such detailed examination of the contractor's records to assure the necessary degree of supervision and control. In other words, the clear intent of the statute was to provide for the examination by our Office of such of the contractor's records as would permit a valid evaluation of the reasonableness of the prices charged. This is clearly established by further remarks made by Congressman Hardy on the floor of the House of Representatives immediately after those quoted above (97 Cong. Rec. 13198) as follows:

> "In normal times, competitive bidding generally operates as a brake on the price which a contractor can demand from the Government for his goods and services. However, these are not normal times, and it should be obvious to all of us concerned with the expenditure of billions of dollars for national defense that we must establish every reasonable safeguard against waste and extravagance in the spending of these vast sums. Under conditions as they now exist, competitive bidding has little or no effect upon contracts which are negotiated without advertising. As a result, when a contract is being negotiated, here is a typical illustration of what usually happens: A contractor with years of experience comes to the conference table accompanied by a highly competent accountant and equally competent lawyer. The Government representative on the other side of the table will, in a great majority of cases, be at a tremendous disadvantage, from the standpoint of both training and experience, no matter how conscientious and honest he may be. So, aside from any intentional liberality on the part of the Government contracting officer, there is every chance in the world that the Government will come out on the short end of the deal. *This bill would at least enable the agent of the Congress to check the transactions, both from the Government records and the contractor's books.*" (Emphasis supplied.)

The language of the access to records clauses included in the pertinent agreements is modeled closely after the statutory language and was undoubtedly intended to be

coextensive in scope. Therefore, we must adhere to the position stated earlier that under the contracts we are authorized to examine such of the contractor's records as would permit a valid evaluation of the reasonableness of the prices charged without regard to the factors considered or ignored by the contractor in establishing those prices.

Even though other factors are considered in establishing the prices for drugs furnished to the Government and the prices established for may not be directly proportionate to costs, costs of production nevertheless directly pertain to, and involve transactions related to, the contract. Although it is not a condition to the legal authority of the General Accounting Office to have access to such records, we believe that cost records are directly pertinent to the prices established. We believe also that an examination of the relationship of experienced and estimated costs to the prices paid by the Government, and of the pricing methods used in establishing the prices, is clearly within the scope of the type of examination contemplated and required by the terms of the contract.

It is our position, consistent with our interpretation of the act and the contract provision, (1) that all books, documents, papers, and other records relating to the pricing and cost of performance of negotiated contracts are records relating directly to the contracts and to the Government's financial interest, (2) that such books, documents, papers, and other records are not limited to the formal cost accounting records and their supporting data, but include all underlying data concerning contract activities and operations which afford the basis for, or are involved in any way with, the incurrence of costs by the contractor, (3) that the cost records which we requested and other data supporting the prices charged to the Government by the contractor are directly pertinent to the contracts, and (4) that therefore all such books, documents, papers, and other records and underlying data are subject to examination by the General Accounting Office under its statutory responsibility and authority to examine activities and related costs under negotiated contracts.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT.

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

Defendant Elmer B. Staats, Comptroller General of the United States, objects to Interrogatory Number 3 of the Interrogatories served upon him by plaintiff on the 30th day of May, 1975 on the ground that the interrogatory, except to the extent that defendant has responded thereto, requests information not within the knowledge of possession of the defendant but within the sole knowledge and possession of the plaintiff.

Dated: New York, New York
June 30, 1975

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the Defendant

/s/ _____

NAOMI REICE BUCHWALD
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1972

To:
WEIL, LEE & BERGIN
Attorney for Plaintiff
60 East 42nd Street
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT,

and

UNITED STATES OF AMERICA,
INTERVENOR-DEFENDANT.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the pleadings, the affidavit of John G. Brosnan, Esq., sworn to on August 21, 1975 and annexed as Exhibit A, the affidavit of James D. Martin, sworn to on August 21, 1975, and annexed as Exhibit B, the affidavit of Paul G. Dembling, Esq., sworn to August 25, 1975 and the Rule 9(g) Statement annexed as Exhibit C, and upon all prior proceedings had herein, the intervenor-defendant, United States of America, will move before the Honorable Morris E. Lasker, on September 10, 1975 at 10:00 in the forenoon of that day in Room 2903, United States Courthouse, Foley Square, New York, New York, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure awarding summary judgment to the United States for the relief prayed for in its counterclaim on the ground that there is no genuine issue as to any material fact and that the United States is entitled to judgment as a matter of law and for such other and further relief as the Court deems to be proper.

Dated: New York, New York
August 28, 1975

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: /s/ _____
NAOMI REICE BUCHWALD
Assistant United States
Attorney

Office and Post Office Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007

To: WEIL, LEE & BERGIN, ESQS.
60 East 42 Street
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

v

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT.

AFFIDAVIT OF JOHN G. BROSNAN
IN SUPPORT OF MOTION OF THE UNITED STATES
FOR SUMMARY JUDGMENT

CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

John G. Brosnan being first duly sworn, deposes and says:

1. In the course of my duties as an attorney-advisor with the General Accounting Office I had occasion to review contract numbers V797P-5929b, DSA120-74-C-2404, DSA120-74-C-2724, DSA120-73-D-1769, which form the subject matter of the present suit.

Contract V797P-5929b

2. With respect to contract number V797P-5929b, I determined the following: this contract was awarded to Bristol Laboratories Division of Bristol-Myers Company (Bristol) by the Veterans Administration, Marketing Division, Drugs & Chemicals (VA) on or about March 29, 1973. This requirements type contract was executed to cover the needs of VA for several different pharmaceutical products

from April 1, 1973 through March 31, 1974 at an estimated price of $684,682.68. This contract was negotiated by VA pursuant to the authority of 41 U.S.C. 252(c) (10) and sections 1-3.210(a) (1) and (2) of the Federal Procurement Regulations (FPR) (1964 ed.). 41 U.S.C. 252(c) (10) provides that contracts may be negotiated without formal advertising if "for property or services for which it is impracticable to obtain competition." FPR 1-3.210(a) (1) (1964 ed.) provides that the negotiation authority of 41 U.S.C. 252(c) (10) may be invoked if the property or services can be obtained from only one source or firm. FPR 1-3.210(a) (2) (1964 ed.) provides that such authority may be invoked when competition is precluded because of the existence of patent rights, copyrights, secret processes, control of basic raw material or similar circumstances. Final payment on this contract was made on or about June 25, 1974.

Pursuant to the provisions of 41 U.S.C. 254(c) the above named contract incorporates by reference Veterans Administration Marketing Center Supplemental Provisions No. 1, March 18, 1972, which includes a clause identified as "Examination of Records by Comptroller General" which provides as follows:

> *"EXAMINATION OF RECORDS BY COMPTROLLER GENERAL*
>
> (a) This clause is applicable if the amount of this contract exceeds $2,500 and was entered into by means of negotiation, including small business restricted advertising, but is not applicable if this contract was entered into by means of formal advertising.
>
> (b) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under this contract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and rec-

ords of the Contractor involving transactions related to this contract.

(c) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under the subcontract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulation Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers and records of such subcontractor, involving transactions related to the subcontract. The term 'subcontract' as used in this clause excludes (1) purchase orders not exceeding $2,500 and (2) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

(d) The periods of access and examination described in (b) and (c), above, for records which relate to (1) appeals under the 'Disputes' clause of this contract, (2) litigation or the settlement of claims arising out of the performance of this contract, (3) costs and expenses of this contract, as to which exception has been taken by the Comptroller General or any of his duly authorized representatives, shall continue until such appeals, litigation, claims or exceptions have been disposed of."

Contract DSA120-74-C-2404

3. With respect to contract number DSA120-74-C-2404, I determined the following: this contract was awarded to Bristol by the Defense Personnel Support Center, Defense Supply Agency (DSA) on or about February 26, 1974 for a definite quantity of Ampicillin capsules at a price of $34,649.19. This contract was negotiated by DSA pursuant to the authority of 10 U.S.C. 2304(a) (7) as implemented by Armed Services Procurement Regulation (ASPR) 3-207 (1973 ed.). 10 U.S.C. 2304(a) (7) provides that negotiation may be used in lieu of formal advertising if the "purchase or contract is for medicine or medical supplies".

ASPR 3-207 (1973 ed.) provides, in part, that the authority of 10 U.S.C. 2304(a) (7) shall only be used when the supplies to be procured are particular to the field of medicine. Final payment on this contract was made on or about June 4, 1974.

Contract DSA120-74-C-2724

4. With respect to contract number DSA120-74-C-2724 I determined the following: this contract was awarded to Bristol by DSA on or about March 29, 1974, for a definite quantity of Ampicillin for oral suspension at a price of $152,775.79. This contract was negotiated by DSA pursuant to the authority of 10 U.S.C. 2304(a) (7) as implemental by ASPR 3-207 (1973 ed.). Final payment on this contract was made on or about July 26, 1974.

Contract DSA120-73-D-1769

5. With respect to contract number DSA120-73-D-1769 I determined the following: this contract was awarded to Bristol by DSA on or about January 23, 1973. This requirements type contract was executed to cover the needs of DSA for several different pharmaceutical products from January 23, 1973 through January 23, 1974 at an estimated price of $1,338,050.00. This contract was negotiated by DSA pursuant to the authority of 10 U.S.C. 2304(a) (7) as implemented by ASPR 3-207 (1973 ed.). Final payment on this contract was made on or about June 24, 1974.

6. Pursuant to the provisions of 10 U.S.C. 2313(b) the above-numbered contracts mentioned in paragraphs 3 and 4 incorporate by reference Standard Form 32, General Provisions, Supply Contract, November 1969, as modified by Defense Personnel Support Center Master Solicitation (Medical), DPSC Form 3539, January 1973, which, in turn incorporates by reference a clause entitled "Examination of Records by Comptroller General (1971 Mar.)" as set forth at ASPR 7-104.15 (1974 ed.), which provides as follows:

"EXAMINATION OF RECORDS BY COMPTROLLER GENERAL (1971 MAR)

(a) This clause is applicable if the amount of this contract exceeds $2,500 and was entered into by means of negotiation, including small business restricted advertising, but is not applicable if this contract was entered into by means of formal advertising.

(b) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.

(c) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term 'subcontract' as used in this clause excludes (i) purchase orders not exceeding $2,500 (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

(d) The periods of access and examination described in (b) and (c) above for records which relate to (i) appeals under the 'Disputes' clause of the contract, (ii) litigation or the settlement of claims arising out of the performance of this contract, or (iii) costs and expenses of this contract as to which exception has been taken by the Comptroller General or any of his duly authorized representatives, shall continue until such

appeals, litigation, claims or exceptions have been disposed of."

7. Pursuant to the provisions of 10 U.S.C. 2313(b) the above-numbered contract mentioned in paragraph 5 incorporates by reference Standard Form 32, General Provisions, Supply Contract, November 1969, as modified by Defense Personnel Support Center Master Solicitation, DPSC Form 3385, January 1972, which, in turn, incorporates by reference, a clause identified as "Examination of Records by Comptroller General (1971 Mar.)" as set forth at ASPR 7-104.15 (1974 ed.). This clause is identical to that cited in paragraph 6.

/s/ _____
JOHN G. BROSNAM

Washington D.C.

Subscribed and sworn to before me this 21 day of Aug, 1975.

/s/ Carl E. Berger
Notary Public

My Commission expires: July 14, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 75 CIV 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT,

and

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

AFFIDAVIT

CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

James D. Martin being duly sworn, deposes and says:

1. I am a certified public accountant and the Deputy Director of the Manpower and Welfare Division (MWD) of the General Accounting Office (GAO), and I have personal knowledge of the facts and proceedings herein.

2. The purpose of this affidavit is to show the rationale behind the request of the Comptroller General of the United States that he be permitted to examine Bristol's cost records which directly pertain to specific negotiated contracts which Bristol holds with the Government.

3. I am responsible for assisting the Director of MWD in the administration and operations of MWD for the Comptroller General of the United States. Under section 312 of the Budget and Accounting Act, 1921, 42 Stat. 25, the Comptroller General is responsible for investigating all

matters relating to the disbursement and application of public funds, for submitting to the Congress reports on the adequacy and effectiveness of the administrative examination of accounts and recommendations looking to greater economy or efficiency in public expenditures, and for reporting any expenditure or contract made in violation of the law. As a part of my duties I assist the Director of MWD in fulfilling his responsibility for the preparation of the reports and recommendations which concern the health-related programs of all departments and agencies of the Federal Government for submission to Congress under the cited statutory authority.

4. During 1972 and 1973, discussions were held by GAO representatives with representatives of the Pharmaceutical Manufacturers Association (PMA) and several of its member firms in connection with a proposed study of the drug industry contemplated by GAO as a part of its work in reviewing the Federal drug procurement system.

5. As a result of these discussions with PMA, GAO representatives made visits of 2 or 3 days to the facilities of 6 drug manufacturers, including that of Bristol Laboratories Division of Bristol-Myers Company (Bristol). These visits were designed to obtain for GAO an understanding of the drug manufacturing industry and to enable GAO to develop a meaningful approach for its contemplated study of drug procurement.

6. Although GAO's original plans for a comprehensive study of the salient economic and operational aspects of the drug industry were dropped because of a lack of cooperation from the industry, a more modest study is planned to be based on data obtained through the use of GAO access-to-records authority under specified negotiated contracts such as those cited in the Comptroller General's August 26, 1974 letter sent to Bristol (Appendix I). Similar letters were sent to 5 drug firms in addition to Bristol.

7. I know that during the visits to 6 drug firms, including Bristol, GAO representatives learned that in general the costs of the drug firm's normal pharmaceutical operations include a variety of costs such as manufacturing

costs, research and development costs, marketing and promotion costs, physical distribution costs, and general and administrative costs. In order to determine the bases of the prices of pharmaceuticals sold to the Government it is necessary to identify the nature and amount of all costs incurred by the contractor which are recovered by the contractor from the revenues derived by the sale of its pharmaceuticals.

8. It is my understanding that under the cost accounting systems utilized by the drug firms visited, the only significant costs which are assigned to individual products are manufacturing costs such as labor costs, material costs and, in some cases, certain manufacturing overhead costs. These costs, like the costs described in the paragraph next following, are recovered in revenues derived from the sale of pharmaceuticals. Bristol is willing to permit GAO to examine its records pertinent to such costs.

9. The drug firms we visited generally treat the costs they do not assign to particular products or contracts, as period expenses. These costs too are recovered through revenues generated from sales of their products including the sale of products to the Government pursuant to negotiated contracts such as those cited in the Comptroller General's August 26, 1974 letter. For example, PMA has stated at page 13 of its Annual Survey Report '71–72, Pharmaceutical Industry Operations Research and Development Activity (Appendix II) that the drug industry devotes a "significant portion" of its sales revenues (11.9 percent of the industry's 1971 sales) to research of new and improved ethical drug and biological products. These types of costs then are significant in amount and must be recovered in the sale of the company's products if the company is to make a profit on its investment.

10. The objective of GAO's study, as presently contemplated, is to review contract pricing by the Government's suppliers of drug items to determine the adequacy of the protection afforded the Government by the negotiation techniques used by the procuring agencies. The accomplishment of this objective is contigent upon GAO's

ability to gain access to the records needed to (1) ascertain the nature of the activities for which the drug firms are incurring costs, and (2) ascertain and verify the extent to which the costs of these activities affect the prices paid by the Government for items procured under specified negotiated contracts. Such costs include both those costs which the firms assign to particular products and those which, although they are incurred during the drug firm's normal operations and are recovered through revenues generated by sales of the firm's products, may not be assigned by those firms to particular products.

/s/ _____
JAMES D. MARTIN

Washington D.C.

Subscribed and sworn to before me this 21 day of Aug, 1975

/s/ Carl E. Berger
Notary Public

My Commission Expires: July 14, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

v.

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT

AFFIDAVIT OF PAUL G. DEMBLING IN SUPPORT OF THE MOTION OF THE UNITED STATES FOR SUMMARY JUDGMENT

CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

Paul G. Dembling, being first duly sworn, deposes and says:

1. I am, and have been since November 17, 1969, General Counsel of the General Accounting Office. In that position I act as chief legal advisor to the Comptroller General of the United States, who is the head of the General Accounting Office. Under section 312 of the Budget and Accounting Act, 1921, 42 Stat. 25, the Comptroller General is responsible for investigating all matters relating to the disbursement and application of public funds, for submitting to the Congress reports on the adequacy and effectiveness of the administrative examination of accounts and recommendations looking to greater economy or efficiency in public expenditures, and for reporting any expenditure or contract made in violation of law. As part of my duties I am charged with reviewing generally, and particularly for

legal sufficiency, the reports and recommendations prepared for submission to Congress under the cited statutory authority.

2. There is included in negotiated contracts pursuant to 10 U.S.C. 2313(b) and 41 U.S.C. 254(c) a clause which provides in substance that the Comptroller General or any of his duly authorized representatives shall, until the expiration of three years after final payment, have access to and the right to examine any directly pertinent books, documents, papers and records of the contractor or his subcontractors involving transactions related to the contract or subcontracts (access-to-records clause). The access-to-records clause and the statute requiring its inclusion in negotiated contracts has been consistently used by the Comptroller General since enactment of the statute, and I know of no official congressional action to modify the statute or the access-to-records clause to limit their interpretation as asserted by the Comptroller General.

3. Examinations and audits of contractor records pursuant to the access-to-records clause have, as hereinafter detailed, resulted in (1) effecting a reduction in price in instances where such prices were regarded by representatives of the Comptroller General as excessive, (2) obtaining cost and price information which was given to procuring agencies for use in future negotiations and procurements, (3) providing a source for making recommendations to the Congress for Federal procurement legislation.

4. Examination by the General Accounting Office of contractors' records pertaining to negotiated contracts has resulted, in many instances, in the disclosure of profits considered by trained auditors in the employ of the General Accounting Office to be abnormally high. In a number of cases it has been possible, through the use of the contractual right to examine such records, to effect a reduction in such prices. For example, I have reviewed records of the General Accounting Office which show that the total value of contracts and subcontracts examined pursuant to the access-to-records clause by our Procurement and Systems Acquisition Division in fiscal years 1974 and 1975 to

date was $814,900,000. Of that amount, those records show that $4,964,437 was determined to be the result of overpricing. I have also reviewed records of the General Accounting Office which show that in fiscal years 1974 and 1975 to date, $5,004,135 was recovered from contractors and subcontractors as a result of earlier determinations of overpricing made pursuant to access-to-records clause investigations by the General Accounting Office. The General Accounting Office could not have performed the type of audits which led to the initiation of action to effect the recoveries, without the access to the contractors' records made possible by the inclusion in the contracts of the access-to-records clause.

In addition to leading to the described recoveries, the disclosure of profits deemed abnormally high has resulted in instances where the Comptroller General has advised the contracting agencies to negotiate prices more carefully or to obtain greater competition in future similar procurements.

Also, findings resulting from audits which included the examination of production cost records under contracts negotiated with the Government have provided a source for recommendations to the Congress for amending Federal Procurement legislation.

/s/ _____

PAUL G. DEMBLING

Subscribed and sworn to be before me this ___ day of ___ 1975.

My Commission expires:

_____

Notary public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 CIV 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-Against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT,

and

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

STATEMENT UNDER LOCAL RULE 9(g)

STATEMENT OF THE MATERIAL FACTS AS TO WHICH THERE ARE NO GENUINE ISSUES

The following is a statement of the material facts as to which defendants contend there is no genuine issue to be tried.

1. On or about January 23, 1973, plaintiff was awarded a contract with the Defense Personnel Support Center, Defense Supply Agency, for the sale of certain pharmaceutical products. Said contract is identified as DSA 120-73-D-1769.

2. On or about March 29, 1973, plaintiff was awarded a contract with the Veterans Administration, Marketing Division, Drugs & Chemicals, for the sale of certain pharmaceutical products. Said contract is identified as V797P-5929b.

3. On or about February 26, 1974, plaintiff was awarded a contract with the Defense Support Center, Defense

Supply Agency, for the sale of certain pharmaceutical products. Said contract is identified as DSA 120-74-C-2404.

4. On or about March 29, 1974, plaintiff was awarded a contract with the Defense Personnel Support Center, Defense Supply Agency, for the sale of certain pharmaceutical products. Said contract is identified as DSA 120-74-C-2724.

5. Each of the aforementioned contracts had incorporated therein a clause that provided, in part:

> "(b) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under this contract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulation or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.
>
> "(c) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under the subcontract or such lesser time specified in either Appendix M of the Armed Services Procurement Regulations or the Federal Procurement Regulations Part 1-20, as appropriate, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor, involving transactions related to the subcontract. The term "sub-contract" as used in this clause excludes (1) purchase orders not exceeding $2,500 (2) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public."

6. The aforementioned contracts were not entered into by means of formal advertising.

7. In a letter dated August 26, 1974 from defendant Staats to Mr. Richard L. Gelb, President and Chief Executive Officer of plaintiff, defendant formally requested that plaintiff make available for examination by defendant all records of costs directly pertinent to the subject contracts.

8. On or about February 10 and 11, 1975 representatives of defendant Staats met with representatives of plaintiff in the latter's offices in Syracuse, New York. Although plaintiff made available for examination by defendant Staats' representatives those records it felt are directly pertinent to the subject contracts, said records were deemed incomplete by defendant Staats' representatives.

9. Under date of March 6, 1975, defendant Staats, in a letter to Mr. Richard L. Gelb, informed plaintiff inter alra that if it did not comply within 10 days with his formal request of August 26th, he would take "such action deemed appropriate." Weil Affidavit Exh. D.

10. The Comptroller General has a right of access to and examination of the following categories of records of plaintiff.

(1) Records relating to those costs assigned by plaintiff to the products purchased under the subject contracts, which industry representatives have indicated are limited essentially to manufacturing costs.

(2) Records relating to the methodology, and decisions involved in plaintiff's establishment of prices for the products purchased under the subject contracts.

(3) Records required to verify, to the extent deemed necessary, all data obtained during the course of any review conducted.

10. Plaintiff recovers costs for activities such as research and development, marketing and promotion, distribution and administration through revenues generated from sales of its products to the Government pursuant to negotiated contracts such as those cited in the Comptroller General's August 26, 1974 letter.

11. The only significant costs which are assigned to individual products are manufacturing costs such as labor costs, material costs, and in some cases, certain manufacturing overhead costs.

Dated: New York, New York
August 28, 1975

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: /s/_____
NAOMI REICE BUCHWALD
Assistant United States
Attorney
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TO: WEIL, LEE & BERGIN
60 East 42nd Street
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No.
75 CIV 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT,

and

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

PLAINTIFF'S STATEMENT CONCERNING THOSE OF DEFENDANT'S "FACTS" AS TO WHICH THERE ARE GENUINE ISSUES*

The following statements** are made in opposition to defendant's statement under local rule 9(g).

7. The letter dated August 26, 1974 from defendant Staats to Mr. Richard L. Gelb, President and Chief Executive Officer of plaintiff, requested that plaintiff make available for examination by defendant records of costs that were not limited to ones that are directly pertinent to the subject contracts.

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*For its statement under local rule 9(g), plaintiff relies on the statement filed in support of its motion for summary judgment.

**Plaintiff's statements are numbered to correspond to defendant's statements of fact.

10.* This statement would be accurate if it read:

Plaintiff recovers expenses for activities such as research and development, marketing and promotion, distribution and administration through revenues generated from sales of its products without allocating them to any customer class, customer or contract.

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*This is in opposition to the second of defendant's statements numbered "10".

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No.
75 CIV 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT,

and

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF ONONDAGA)

LORNE C. D. MACBETH, being duly sworn, deposes and says:

1. I am Vice President-Marketing of Bristol Laboratories Division of Bristol-Myers Company and I have personal knowledge of the facts and proceedings herein.

2. I am a member of the Bristol Laboratories Pricing Committee which has as its responsibility the recommending of prices to be charged on government contracts.

3. The purpose of this affidavit is to set forth those costs considered by Bristol Laboratories in setting the prices on the products supplied under the contracts at issue in this litigation.

4. In setting prices to the government, Bristol Laboratories considers manufacturing costs such as: raw and

packaging materials, labor and fringe benefits, quality control and supervision; manufacturing overheads such as: plant administration, production planning, warehousing, utilities, and security; royalty expense; and, in a general way, the cost of delivery to the sites specified in the contract.

5. Bristol Laboratories does not consider expenses incurred for research and development; advertising and promotion; general and administrative; and distribution (except as set forth in Paragraph 4) in setting contract prices to the Federal Government.

/s/_____
LORNA C. D. MACBETH

Sworn to before me this 29th day of September, 1975.
/s/ Grace B. Maloney
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ 1334

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

v.

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT,

v.

UNITED STATES OF AMERICA,
DEFENDANT-INTERVENOR

April 6, 1976
10:30 a.m.

Deposition of BRISTOL LABORATORIES by RICHARD J. CORMIER, taken by Defendant pursuant to notice dated February 20, 1976 at the United States Attorney's Office, One St. Andrew's Plaza, New York, New York, before Elizabeth Whittet, a Shorthand Reporter and Notary Public of the State of New York.

[2] ATTORNEYS FOR PLAINTIFF:

ROBERT N. ENDRIES, Esq.
In-House Counsel, Bristol Laboratories
P.O. Box 657
Syracuse, New York.

WEIL, GUTTMAN & DAVIS, Esqs.,
Attorneys for Bristol Laboratories
60 East 42nd Street
New York, New York 10017

ROBERT L. SHERMAN, Esq.,

of Counsel

ALSO PRESENT:
JAMES D. MARTIN
DAVID P. BAINE
JOHN G. BROSNAN

ROBERT B. FISKE, JR.,
United States Attorney
Southern District of New York
NAOMI REICE BUCHWALD,
Assistant United States Attorney

* * * * *

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto that the sealing, filing and certification of the within deposition be waived; that such deposition may be signed and sworn to before any officer authorized to administer an oath; that all objections except as to form are reserved to the time of trial.

[2] RICHARD J. CORMIER,
having been first duly sworn, was examined and testified as follows:

EXAMINATION BY
MS. BUCHWALD:

Q Mr. Cormier, would you state your full name and home address for the record.

A Yes. Richard J. Cormier, 6358 Ledgewood Drive, Jamesville, New York 13078.

Q Mr. Cormier, by whom are you employed?

A By Bristol Laboratories.

Q In what capacity are you employed by Bristol Laboratories?

A As Vice President and Controller.

Q How long have you been employed by Bristol Laboratories?

A Approximately one year.

Q Have you held the position of Vice President and Controller the entire year?

A Yes, sir.

Q Mr. Cormier, before I begin let me just say, so that we understand each other, that when I refer to Bristol, unless I state otherwise, I am referring to Bristol Laboratories, and that when [3] I speak about production of drugs or ethical pharmaceuticals that I am speaking about the domestic production rather than the international production of drugs or ethical pharmaceuticals.

A Can you also clarify the time frame? Is there a certain period you are trying to cover?

Q My questions at this point do not have a particular time frame.

If I ask you a question and it turns out that something is true today but was not true at an earlier time, I would appreciate your specifying that if you note any difference.

Mr. Cormier, what is the corporate relationship between Bristol Laboratories and Bristol-Myers Company?

A Bristol Laboratories is a division of Bristol-Myers Company.

Q What are the product lines or business components of Bristol Laboratories?

A Are you referring to basic products? We are pharmaceutical manufacturers and suppliers.

Q Do you break down your production into any other more general components?

A Yes, our production is—our plant [4] production is produced by lot numbers for given products.

Q Focusing more on the types of products that Bristol Laboratories produces, do you divide Bristol Laboratories' production into any particular product lines, particular components?

A Our production is generally planned based on projected need. The production is really geared to a—by lots of specific products. In other words, today we may be producing a specific polycillin in a given size.

Q Focusing on the question more from an accounting perspective, do you divide the production of Bristol Laboratories into any particular lines of products?

A Not as such. If I am understanding you properly, we don't summarize and determine that a given product is produced in X quantities. We don't attempt to distinguish production by products per se.

MR. SHERMAN: It seems that we may be missing each other here.

Perhaps by way of examining him you could indicate what you are trying to ask.

[5] Q Mr. Cormier, in determining the profitability, the profits of Bristol Laboratories, do you utilize certain profit centers?

A Yes, we do.

Q What are those profit centers?

A Profit centers—I guess we might call them expense centers. We basically determine our profit on the total volume. We don't break it down by any other groupings, if that's what you are referring to.

Q Are you telling me that at no time or that no part of your accounting system breaks down profits into individual profit units?

A At the gross profit line we would break it down. We would have a record of estimated profits. The gross profit line reflects net sales less the cost of product.

Q What is the breakdown which you use at the gross profit line?

A There we would use individual product summaries.

Q Do you use any other breakdown than individual products?

A Yes. We might summarize by total [6] pharmaceutical products versus total veterinary products.

Q Mr. Cormier, what are ethical pharmaceuticals?

A I am not sure I can answer that question when you say "ethical pharmaceuticals." I assume that they are

probably a prescription type of pharmaceuticals.

Q In other words, is there a distinction between an ethical pharmaceutical and an over-the-counter drug?

A Yes, there is.

Q And the drugs which are involved in this lawsuit and the contracts involved here, those are ethical pharmaceuticals as distinct from over-the-counter drugs?

A Yes.

Q Does Bristol Laboratories produce over-the-counter drugs?

A Yes; very limited.

Q For accounting purposes, are your records divided as between over-the-counter drugs and ethical pharmaceuticals?

A Not really.

[7] Q Apart from ethical pharmaceuticals and over-the-counter drugs, does Bristol Laboratories produce any other products, types of products?

A Are you referring to products for humans?

Q It could be for humans.

A We have the veterinary products which are for animals.

Q Any other types of products? Do you have industrial products?

A No, we don't.

Q Mr. Cormier, are the drugs involved in the contracts at issue here produced entirely by the pharmaceutical component of Bristol Laboratories?

A I am sorry, could I hear that again?

Q Are the drugs involved in the contracts here at issue produced entirely by the pharmaceutical component at Bristol Laboratories, or more generally just by Bristol Laboratories?

A Those in question I believe were primarily produced by Bristol Laboratories at that time.

During the latter part of this contract there was a division made between Bristol Laboratories in some of the manufacturing sites. We [8] were set up as a separate division, so during late 1974 it is possible that some of these components could have been produced by a division at Bristol-Myers Company which was not a part of Bristol Laboratories.

Q What was that other division of Bristol-Myers Company?

A We refer to it as the Industrial Division.

Q Where is the Industrial Division located?

A Headquarters is located in Syracuse and there are plants in Puerto Rico, Syracuse, and I believe in Italy.

Q Apart from the Industrial Division of Bristol-Myers and Bristol Laboratories, does any other division or part of Bristol Myers produce ethical pharmaceuticals?

A I believe that some of the other divisions of Bristol-Myers produces ethical pharmaceuticals.

Q Do you know what those divisions are?

A I would assume that Meade-Johnson might have some prescription products. I am frankly not completely sure.

Q If we assume that the Industrial Division of Bristol-Myers participated in the manufacture of some of the drugs which are in issue in these contracts, does the Industrial Division of Bristol Myers therefore [9] accumulate the costs related to that manufacturing?

A Yes, it does. I probably should clarify that. It compares its costs to manufacture with the present estimated costs which we call a standard.

Q But in that process of comparison it records the costs actually incurred?

A No. We do not record actual costs by products.

Q Do you recall actual costs by division?

A By division, yes.

Q If the Industrial Division of Bristol-Myers partici-

pated in the manufacture of certain of the drugs which were sold by Bristol Laboratories to the Government, were the costs related to that production reflected on the books of Bristol Laboratories?

A The standard costs of that product in the Industrial Division was transferred to Bristol Laboratories. Any other costs would have been transferred as a separate division assessment.

Q What is a transfer as a division assessment?

A The Industrial Division produces product against predetermined standard costs. Any excess expenses or income that it might generate above or below these costs are transferred to Bristol Laboratories at the [10] indirect ratio to the per cent of volume that we utilize from that plant's production, from that division's production.

Q Does Bristol Laboratories do all the marketing of the ethical pharmaceuticals which were involved in these contracts?

A Yes, it does.

Q Does Bristol Laboratories do all the distribution of the ethical pharmaceuticals which were involved in these contracts?

A The distribution to—it does distribute to wholesalers who do further distribution of the product.

Q Perhaps let me ask it another way.

Does any other part of Bristol-Myers have any involvement in the distribution of the ethical pharmaceuticals which are involved in these contracts apart from Bristol Laboratories?

A Not within the United States.

Q Mr. Cormier, does Bristol Laboratories do all the company's research and development for ethical pharmaceuticals which are produced by Bristol Laboratories?

MR. SHERMAN: Excuse me, when you refer [11] to the companies do you mean Bristol-Myers Company or the Division?

MS. BUCHWALD: I may have misspoke. Let me try

the question again.

Q Mr. Cormier, does Bristol Laboratories do all the research and development for those ethical pharmaceuticals which are produced by Bristol Laboratories.

A I am sorry. I know you said it right, but could you repeat that?

(Question read.)

A Not necessarily.

Q What other division or part of Bristol-Myers may do research and development for ethical pharmaceuticals which are produced by Bristol Laboratories.

A Meade-Johnson Company can conceivably do some work in this area, BMCID, Division of Bristol-Myers which is the International Division.

MR. ENDRIES: That is an acronym for Bristol-Myers Company International Division.

Q Mr. Cormier, does Bristol Laboratories have a Pricing Committee?

A Yes, it does.

Q Are you a member of that Committee?

A Yes, I am.

[12] Q Who else are members of the Bristol Laboratories Pricing Committee? Can you tell me their names and their titles?

MR. SHERMAN: Excuse me. I think on this question we should define the time period involved. Do you want the current Committee?

Q Let's take the current Committee.

A You want the names and titles?

Q Right.

A Lauren MacBeth, Vice-president of Marketing, John Shaw, General Product Manager, Tom Connelly, I believe it is National Sales Manager and the Group Product Manager for the individual products in question would sit in on the Committee. There are two such Product Managers, Gary Gibson, he was Group Product Manager of, I would

say, primarily Antibiotics. Neither he or Allen Fox, who is Group Product Manager—I don't have the exact breakdown of what products each of these gentlemen have.

In addition to that, Richard Jackson, Director of Financial Planning, Raymond Egan, General Manager of the Veterinary Division, Robert Wenzel, Vice-President of Materials Handling, Otto Nonnenmann, Director of Manufacturing.

[13] I should say Robert Endries is a non-voting member of the Committee. He is Chief Counsel for Bristol Laboratories.

Q Mr. Cormier, are all of these gentlemen whom you have just named as members of the Pricing Committee are their positions with Bristol Laboratories?

A Yes, they are.

Q Apart from the fact that perhaps some of the gentlemen holding these various positions has changed over the years, did the persons holding the same positions sit on the Pricing Committee back in 1973 and 1974, if you know?

A This Pricing Committee was formed, I believe, in the latter part of 1974.

Q Prior to the latter part of 1974 when this Pricing Committee was formed, was there some other body at Bristol Laboratories that performed essentially the same function the present Committee performs today?

A Basically the Product Manager and his market superiors probably accomplish the same thing.

Q What is the function of the Pricing Committee and its informal predecessor?

A To pass on the acceptability of prices being proposed for new products or existing products, [14] particularly in the area of bids.

Q From whom does the Pricing Committee obtain the information upon which it basis these pricing decisions?

A Generally from the Pricing Manager. In some situations it receives it from the Manager of Government sales,

I believe.

Q Are either of those gentlemen, the Pricing Manager or the Manager of Government Sales, members of the Pricing Committee?

A No, they are not. I might add that information on new products would probably come from the Product Managers.

Q What is the function of the job of a Pricing Manager?

A He basically files the formal bids and the informal bids of our customers. He loads the bid prices into the computer. He records as much as possible, the results of prior bids.

Q What is the function or the job of the Manager of Government Sales?

A He is responsible for following government requirements and making sure that we bid on all government requirements. He coordinates the activities [15] of those sales people in the field who might call on government facilities.

Q Incidentally, Mr. Cormier, do you know the approximate amount of sales which Bristol Laboratories makes to government contracts as distinct from non-government contracts?

A No, I don't.

Q Are there any records at Bristol Laboratories that would give the answer to that question?

A Not without a great deal of research.

Q Are there any other committees at Bristol Laboratories that are concerned with pricing decisions?

A No.

Q Who makes the final decision as to pricing?

A In most cases it would be the Pricing Committee.

Q In cases when it is not the Pricing Committee, who is it?

A It is conceivable it could go before the Operating Committee.

Q Is that an Operating Committee of Bristol Laboratories?

A Of Bristol Laboratories.

Q Who sits on the Operating Committee? Not [16] their names, give me their positions.

A Generally the people who report to the President of the company.

Q Just briefly what positions do these people have?

A The Vice-president of Materials Handling, Vice-president of the Controller, Vice-president of Marketing, Director of Manufacturing, Chief Counsel, Director of Quality Control, Director of Research, Vice-president in charge of Research, Vice-president of Personnel.

Q Apart from yourself, which officers of Bristol Laboratories are concerned with financial matters?

A The President, of course, is involved in all phases of the business including financial activities.

Q Is it just you and he primarily?

A In terms of financial responsibilities, yes.

Q What is the involvement, if any, of Bristol-Myers Company in determining the pricing of products produced by Bristol Laboratories?

A Today they are basically not involved, however until probably five or six months ago they did [17] review any price increases that were proposed, and I believe, were notified and passed on prices of new products.

Q Who at Bristol-Myers in this period up to six months ago would have been involved in passing upon price increases or new product prices?

MR. SHERMAN: Before the witness answers that question—I have really been sitting back rather quietly. I would like to just state that the deposition that was noticed, and according to Judge Lasker's decision, is a fairly narrow one. I have not been objecting, and I don't intend to start objecting to the scope of the examination, but I wonder if we could somehow home in on the real issues involved and the methods and procedures of ac-

counting and allocation.

We seem to be drifting further and further afield.

MS. BUCHWALD: I don't think that we are drifting afield, Mr. Sherman. I think we are directly within the scope of Judge Lasker's decision since the deposition notice specifically refers to methods and procedures for allocation and recovery of costs.

Surely, I think we would all agree that it is from the prices which are charged for goods, [18] drugs produced by Bristol Laboratories, that is, costs to recover. I don't think that we will be too far along this particular line. We don't have too much to go on this particular line.

Anyway, there was a question pending, I think.

(Question read.)

A Mr. C.F. Michaelis, Mr. L. Brokaw, and I am not sure who else was on that Committee.

Q Mr. Cormier, when the Pricing Committee is considering the price to be charged for a new product, let's say, what type of information does it have before it?

A It would have estimated cost of a product. It would have probably competitive products and pricing. It would possibly look at other related products within the division, costs and some prices, standard manufacturing costs that is.

Q When you said before estimated costs, could you describe that more fully?

A The Engineering Departments and the Cost Accounting Departments would collaborate to estimate the material, the labor and the overhead costs of a planned new product introduction, cost to manufacture that [19] product.

Q Do you have before you any data on the cost that had previously been incurred to create the product?

MR. SHERMAN: When you use the word "you", do you mean the Pricing Committee?

MS. BUCHWALD: Yes.

A I just want to be sure I understand the question.

Q Do you mean costs which we incurred prior to introducing the product?

Q Right.

A One clarification I think I should make is I mentioned that we estimated the cost, and I mentioned overhead. This is strictly manufacturing overhead.

Q Mr. Cormier, does Bristol Laboratories accounting system identify the results of operations attributable to its domestic ethical pharmaceutical business?

A Yes, it does.

Q Does the accounting system of Bristol Laboratories identify any costs by business segment? In this case, I am referring to, as we discussed earlier, the Pharmaceutical Division. We have the [20] Veterinary Division. Are any of your costs identified to those various business segments of Bristol Laboratories

A We make an attempt on a limited basis to identify some of the costs related to pharmaceutical versus veterinary business.

Q Is that the only division that you attempt to make?

A That all depends where on the profit and loss statements you are referring to. We have no—in fact, at our present taxed profit line we have no distinction between any of them.

Q But that is not exactly my question. What I am asking is whether your accounting system at some stage, not necessarily your tax stage, identifies any costs by these product divisions?

A I should point out that all of our product costs, which reflect our manufacturing costs, are handled on a standard cost basis. We do not attempt to determine the actual costs by groupings. We do know that costs are based on standards, but any deviations from those standards I am not basically identifying by product groups.

Q Let me ask you this then:

How do you arrive at your standard costs?

[21] A Standard costs—we estimate.

Say in August or September of one year we estimate what our raw material, packaging materials, labor machinery costs and factory overhead costs would be, and this estimate forms the standard cost which then is what is measured against the income to determine gross profit margins.

In addition to this, grouped together we have any variations that occur when those estimated costs are put into what we call a variance account. That variance account does not attempt to determine what products those variances apply to.

Q In determining the standard costs and your making an estimate, is that purely an estimate looking to the future, or is there some function in that estimation based on past experience?

A The estimate is based on what we expect that product to cost it in the year that it would be produced, the average cost during that year. Past history in some cases would be a factor in determining some of the components of that estimated cost.

Q Does the accounting system of Bristol Laboratories identify any costs by product?

A There again, it identifies the standards, [22] but in the manufacturing costs it does not further break down the variances from that standard by product.

Q Does the accounting system of Bristol Laboratories identify any costs by contract?

A None at all, to my knowledge.

Q Does the accounting system of Bristol Laboratories identify any cost by class of customer?

A It could down to the gross margin line which merely is a reflection of net income less the manufacturing cost of the product at standard plus royalty expense.

Q Does the accounting system of Bristol Laboratories identify any costs by government versus non-government contracts?

A The only place it ever attempts to get a comparison

here again is by reflecting net sales versus standard costs plus royalties which would bring you down to the gross margin line.

Here again, it cannot, it does not, attempt to determine the exact cost of that product.

Q Mr. Cormier, in your counsel's 9-G statement, which is one of the papers which has been filed in this lawsuit, it was stated that certain expenses such as research and development were recovered from sales, [23] "without allocating them to any class, customer or contract."

What do you understand the meaning of the word "allocate" to be as used in that quotation?

A I assume what he is saying there is no attempt to determine what part of research expenses might apply to any given product or any given contract or any customer group.

Q Is the word allocate a word that can be used interchangeably with the word assign?

A I would think in most cases.

Q Mr. Cormier, just so that we talk the same language, what does the term period expense mean?

A Many companies operate what is called a direct cost system. In a direct cost system the method of accounting attempts to determine the estimated cost of a product based on variable manufacturing costs only. Such things as materials, which normally might vary, where the cost might vary directly with the volume, some direct labor where the cost might vary directly with the volume, the period costs are generally the costs which are considered somewhat fixed and can't be exactly allocated to a given product.

[24] In that cost system period costs are identified as primarily manufacturing overhead costs which do not bear an equal relationship to the individual products or the volume situation in any given product.

Q What was the term that you used to describe this item of accounting?

A Direct cost system.

Q Does Bristol Laboratories operate under a direct cost system of accounting?

A I believe it did at one time, but today we do not. We operate under full absorption manufacturing cost system.

Q Mr. Cormier, what does the term direct product margin mean?

A Are you taking that from any given report you are looking at? I would like to put it in context.

Q I am taking it from some of Bristol Laboratories accounting forms—that is the best way I can describe them—which were, as I understand it, furnished by Bristol Laboratories to representatives in the General Accounting Office.

There is a line on one of these, I think, which appears in more than one place which says, "Direct product margin," and I would just like to know [25] what you mean by that. On the sheet I am going to give you there are some handwritten words. Those are not from his Bristol Laboratories, those are ours.

MR. SHERMAN: I think perhaps we should have that marked as an exhibit.

MS. BUCHWALD: Sure. No problem at all.

Why don't we mark as an exhibit of the United States seven sheets which apparently are some forms used by Bristol Laboratories in connection with their accounting system.

(Seven sheets being forms marked Government's Exhibit 1 for identification.)

Q Let me ask you this, Mr. Cormier, are you familiar with Government's Exhibit 1?

A Yes, I am.

Do you want me to go through all parts of it?

Q No, basically does this look familiar to you?

A Yes. The direct product margin as reflected on page I-2 of this document refers to gross profit margin, gross margin.

Q Does Bristol Laboratories accumulate direct manufacturing costs?

A I would like to distinguish that. When [26] you speak of direct manufacturing costs—we just talked of a direct costing system. I assume you are not referring to direct costs versus fully absorbed costs.

Q I am really going to get a line of questioning in which I am going to ask you of various types of costs, and ask you whether you accumulate those kinds of costs?

A Bristol Laboratories operates on a standard cost system which estimates the costs of each product at a point in time before a year begins, and generally that cost is used during the whole year in question as the cost in attempting to determine any gross profit to the company.

The cost variations that occur from this standard cost are categorized as variances. Those variances are accumulated in a group, for the most part, as part of other manufacturing costs. The only other costs reflected in the cost of goods sold is the royalty cost which can be calculated by product.

Q Just so that there is no confusion, are direct manufacturing costs among those standard costs which Bristol Laboratories calculate?

A I guess I would have to assume when you [27] say direct costs that you are referring to that portion of the standard costs which we can identify as direct costs versus absorbed costs.

Q Yes. I believe that is one of the distinctions I am trying—

A With that in mind, I guess I need the question restated.

Q The question is, considering the direct manufacturing costs as something distinct from what you call absorbed costs, are direct manufacturing costs among the standard costs which Bristol Laboratories accumulates?

A The direct costs are accumulated primarily as a variance to the standard cost.

Q And among those are direct manufacturing costs as one of the variances to standard costs?

A Yes.

Q Are manufacturing overhead costs accumulated as a variance to standard costs?

A Yes, they are.

Q Are general administrative costs accumulated as a variance to standard costs?

A Generally administrative costs do not fall in the manufacturing costs category.

[28] MR. SHERMAN: Excuse me. So the answer to that is no?

THE WITNESS: The answer is no.

Q Are general administrative costs accumulated by Bristol Laboratories?

A In total, yes.

Q Research costs accumulated by Bristol Laboratories?

A Yes, in total.

Q How about development costs, are those accumulated by Bristol Laboratories?

A They could be part of research costs.

Q Are research costs and development costs accumulated separately by Bristol Laboratories?

A Not really.

Q I ask that because on page 1 of Government's Exhibit 1 there are two separate headings, it appears to me, for research costs and development costs under a more general heading, "Not Charged to Profit Centers."

A This form, I-1, is apparently an old form, and at present I am not sure what kind of costs they were reflecting under this development cost.

Q Are advertising and promotion costs accumulated by Bristol Laboratories?

[29] A Yes, they are.

Q Perhaps to shorten things, could you tell me which costs specifically are included in the standard costs?

A None of these that you have just mentioned are included in the standard costs.

Q You are talking about—not included are advertising and promotion, general administrative, research and development?

A That's right.

Q What about manufacturing overhead?

A Manufacturing overhead is included in standard costs and variances.

Q And what we called before direct manufacturing costs, that's also included in standard costs?

A And in variances.

Q Are any other costs included in your standard costs?

A Royalty costs.

Q Any others?

A No.

(Discussion off the record)

A I am sorry, I should correct that. The royalties are not part of the standard costs. They are reflected [30] within the cost of the goods sold portion of the P&L statement, but they really are a separate calculation and not part of the standard costs.

Q Are direct manufacturing costs allocated to products?

Let me rephrase that.

Are all costs which are included in what you call standard costs, are those costs allocated to products?

A Are you referring to actual costs, or are you referring to estimated costs?

Q Let's do one at a time. First the standard costs, are those costs allocated to particular products?

A In the standard costs which are estimated costs, they are allocated to the standards.

Q And the variances, are those allocated to products, the variances from the standard costs?

A No.

Q To what, if anything, are variances from the standard costs allocated?

A They aren't. Variances become a central variance account.

Q Of Bristol Laboratories?

[31] A Right. We could have some type of variances, but not in any way allocated by product.

Q Are research and development costs allocated to any product line or product of Bristol Laboratories, or are research and development costs solely allocated to Bristol Laboratories as a totality?

A They are not allocated.

Q Is the same true for general administrative costs? Are those also unallocated?

A Unallocated.

Q The same for advertising and promotion costs or not?

A In one of our internal reports used for compensation purposes, we do attempt to identify some of the advertising promotion costs by product, not by customer type, but by product.

Q How do you accumulate costs which are not allocated?

A We accumulate them by natural expense classification and total them up to reflect them on the profit and loss statement.

Q What is natural expense classification?

A We might acculumate cost by labor, fringe benefits, travel expense, and total them up for a given [32] category.

Q You spoke earlier about your variances from standard costs. How often do you accumulate the variances to standard costs?

A Variances are accumulated as each transaction is recorded. For example, if we purchased a given raw material and the invoice price is different from that which is used in the standard costs, that variance is recorded at the time the invoice is processed.

Q So there are particular records which reflect these variances from the standard costs?

A Yes. I believe that this is computed by the computer.

Q I may have asked you this earlier, I just don't recall.

Are any costs of Bristol Laboratories allocated exclusively to non-government contracts?

A No.

Q Does the company allocate or assign costs to products or to product lines for any internal management purpose which costs may not be assigned as part of the company's regular cost accounting system, apart from the advertising and promotion costs which you mentioned a few minutes ago?

[33] A That's kind of broad.

(Question read)

A Only as shown on page I-2, Exhibit 1.

Q Since I didn't read Exhibit I-2, why don't you describe to me in words what internal system you have of allocation with respect to my last question.

A The manufacturing costs and royalties without variances, we attempt, for internal purposes, to measure those against a given product, not against any customer groupings, but against a given product. The distribution, advertising and promotion costs we attempt to assign to certain products. Some portions can be identified directly with products although not with customer groupings.

Other portions must be allocated. Some of the sales costs and marketing costs we attempt to allocate for internal measurement of some of our people on an estimated basis to products, not to customer groupings, but to products.

Those are basically the major costs that we attempt in any way to allocate or identify by product.

Q Do you make any internal efforts to allocate research and development costs to products?

A Can I have that again?

[34] Q Do you make any attempt to internally allocate research and development costs to products?

A No, we do not.

Q To product lines?

A No, we do not.

Q Do you have any internal system for allocating research and development costs in any way?

MR. ENDRIES: Within Bristol Laboratories.

A To products?

Q Any way, any internal system, allocate research and development costs within Bristol Laboratories.

A We in the past year and a half, I believe, we have attempted to estimate costs of research based on projects. We have no historical costs before that. These are not products for the most part, these are compounds for the most part that we hoped would eventually become products.

Q Do you treat research and development costs as period expenses?

A Yes.

Q Are all research and development costs allocated to Bristol Laboratories, incurred by Bristol Laboratories, allocated by Bristol Laboratories?

A No.

[35] Q Or some research and development costs incurred by Bristol Laboratories, allocated to Bristol-Myers?

A To other divisions of Bristol-Myers.

Q What other divisions?

A Meade-Johnson Company, BMCID, which is the International Division, and possibly Westwood.

Q How do you determine when you are going to allocate these research and development costs to other divisions of Bristol-Myers?

MR. SHERMAN: I would just like to state when we use the word "divisions," the witness is not a legal expert. There may be subsidiary corporations and not real divisions.

MS. BUCHWALD: All right.

(Question read)

A There are two ways which we might do this. One, if another division requested services from our research and development group, we would charge them for the service. Also, there are certain research expenditures which are classed as future product investment. Those research costs are allocated to the division within the PHI group.

MR. ENDRIES: Pharmaceutical, Health Care and [36] International, PHI.

Q Has this allocation of some research and development costs to other divisions of Bristol-Myers been the practice over the last ten years, or is this a very recent practice?

A I believe there have been some changes in the practice over the last few years. I am not sure what the practice was prior to the last few years.

Q Over the last few years it has been the practice to do some allocation of research and development costs to other divisions of Bristol-Myers?

A Yes.

Q Why do you treat research and development costs as periodic expenses rather than as an indirect manufacturing overhead?

A Research expenses do not really apply to products that were currently selling. They apply to products we hope some day will come into the marketplace. Therefore, there is no real way to apply them against any products we are selling at present.

Q I assume at certain times at least there is continuing

research or development with respect to a current product. In that case, do you assign a computering research cost to the product or nonetheless [37] continue to treat it as a period expense?

A We still treat it as a period expense because the additional research is undoubtedly for a new claim that doesn't exist, and therefore it doesn't apply to the existing product.

Q Is there any limit on the amount of money budgeted for research and development for Bristol Laboratories?

A Yes, there is.

Q How is that limit established?

A Through a budgeting procedure and controls which are subsequently imposed on the spending of funds.

Q Generally speaking, what is the basis of the restriction on the amount of money that can be spent for research and development?

A The basis is probably what we could afford.

Q Net sales of ethical pharmaceuticals identified with the pharmaceutical component of Bristol Laboratories?

A I am not sure I understand the question.

Q What I am trying to find out is, is there a breakdown of net sales by component within Bristol Laboratories, veterinary sales, pharmaceutical sales?

A We do have sales information on the product [38] groupings.

Q Does the Bristol accounting system identify sales by product?

A Yes, it does.

Q Does the Bristol accounting system identify sales to particular types of customers?

A Yes, it does.

Q How does Bristol Laboratories make its customers aware of its prices, prices of its ethical pharmaceuticals?

A They distribute price lists.

Q Are there different price lists for different types of

customers?

A Yes. There is a price list for wholesale accounts. There is a price list for direct accounts. I am sure that there are some price lists issued to some of the government agencies.

Q What specific factors are considered in establishing the price for a product?

A Which price?

Q You can tell me whether it matters whether it is going to be a product sold to a wholesaler, a direct account or a government agency. I was trying to do it step by step. Generally what factors do you [39] consider in setting a price, and on top of that, how do you vary your price by the type of customer to whom you would be selling the product?

A I believe previously I indicated the factors we considered in selling prices were the estimated standard costs. Competitive pricing, our own pricing of similar products. I believe that's part one of the question.

The price to the wholesaler was generally 5 percent lower than the price to the direct accounts. Where there is not a bidding situation, the price to the government we had listed would normally be the wholesale price.

Q What factors go into this 5 percent take-off of percentage discount from direct accounts to wholesale prices?

A Are you asking why we have a 5 percent lower price than wholesalers?

Q Right.

A They are attempting to sell to the drug stores. We do sell to some of the drug stores directly. In order to give them some incentive, we given them a lower price to permit them to cover their costs, to sell to these same customers and hopefully make a profit.

[40] Q You mentioned before that the factors that you considered in setting a price were the estimated standard costs, competitive pricing, and your own price for similar products. Is there any standard way in which these factors weighed one against the other?

A There is no formula whatsoever used in setting prices.

Q With relationship to costs, is there any floor for the price level of a particular product?

A No.

Q Do you, in setting your prices, work under a gross margin figure or direct product margin figure?

A We consider what a gross margin might be, the difference of the prices, if that's what you are asking.

Q I realize that in every case you probably calculate that, but is there any minimal gross margin figure which you must recover before you will sell a product?

A No.

Q Is there any documentation for the pricing decisions with respect to particular products? For example, are there minutes of the Pricing Committee?

A There is a report submitted for the entry of a price into our computer which indicates the prices [41] that were approved in a pricing meeting.

Q But what you feed into the computer is the end result, isn't it? It is the price for the drug that's going to be charged?

A Yes.

Q That's not exactly what I am asking you. What I want to know is, is there any documentation or record of the decision-making process by which you arrive at the price to be charged for a particular drug?

A Do you mean the logistics we used, or are you talking about the end result of our decision?

Q I am not interested in the end result of your decision, which is, I assume, published in your price lists. I am talking about the decision-making process. How did you arrive at that judgment as to what price to charge? Are there documents or other records which would reflect the factors that you considered in arriving at a price, maybe how you weighed one against the other or the like?

A There are no official records, but we could conceivably be given a sheet of paper which would indicate the competitive price lists, our own standard costs, a proposed price, and that we would get conceivably at a meeting. We would use that in making [42] a judgment as to where that price should be. I don't know where—most of mine are tossed out after we make the decision. I don't know if anybody keeps them.

Q Is there a secretary to the Pricing Committee?

A Yes, there is.

Q Does the secretary keep any minutes of the Pricing Committee meetings?

A She makes a record for the participants of the results of the meeting.

Q Does that record ever contain any of the factors that were considered in reaching the result of the meeting?

A It could conceivably.

Q Are there certain occasions on which you decided not to market a certain product after having a meeting with the Pricing Committee?

A When you used the word "market," that implies it is a new product, and we are trying to decide whether we should put it on the market or not put it on the market, or are you referring to a situation where we have a specific quote to make and we decide not to quote?

Q I am not thinking about the bid situation. I am thinking more of either a determination to put a new [43] product on the market, or perhaps another determination to change the price of the product. After the discussion of the Pricing Committee in which you have discussed what price you will have to charge, presumably taking into account your costs, you then decide not to sell this product.

A I don't recall any such situation. It is conceivable that could happen, but unlikely, I would say.

Q Are special considerations which have been given by Bristol Laboratories to meeting certain government requirements for pharmaceuticals taken into account when

Bristol Laboratories establishes its prices to the government?

A If there is a significant change in process or materials, we very likely would consider that factor.

Q Is it the aim of Bristol Laboratories to operate profitably?

A I would say yes.

Q With reference to any and all of the records which you maintain, can you determine the profitability of the product grouping of pharmaceutical products of Bristol Laboratories?

A Not on a pre-tax basis.

Q Can you do it on a post-tax basis?

[44] A No, less so.

Q Again using all of the records you maintained, can you determine the profitability of any particular drug produced by Bristol Laboratories?

A No.

Q Is profitability a factor in deciding whether to market a new drug?

A I don't know that that question ever gets raised in that context. We assume that when we bring a product to market it will help us to offset some of our expenses which we incur.

Q On what basis do you determine to adjust the price of an existing product?

A Is this generally or does this relate to bidding situations?

Q First let's take generally.

MR. SHERMAN: Prices to the government?

MS. BUCHWALD: I am really asking somewhat more generally about your determinations of adjusting the prices for a particular product which, as I understand Mr. Cormier's answers, the government will get a certain percentage discount off of the price list for direct accounts.

What I am trying to ask him is:

[45] Q Generally, in arriving at the price which is going to be included on that price list, and presuming now a situation in which there has been a decision to change the price on the price list, which I presume there is from time to time, what factors go into the adjustment of that price?

A Competitive pricing and cost increases. They are probably the major factors considered.

Q Is there any consideration given to the profitability of the product—

A We don't know what the profit is on the product.

Q You stated before that it was your hope that from sales of products, new products, you would offset expenses. I assume that to operate profitably you must recover costs and expenses from sales revenues, is that correct?

A Yes.

Q Are sales revenues affected by the prices that you charge for products?

A Yes, I would say so.

Q How do you make sure that the prices charged are sufficient to recover your costs and expenses and still have to make a profit?

[46] A We can't determine this by individual products. We historically know what our total sales are, what our total expenses are. That's why many of our comparisons are made on some of our historical information insofar as what kind of prices have succeeded in giving us a total overall profit in the division.

Q Mr. Cormier, what methodology is employed by Bristol Laboratories in establishing prices to be charged to the government under negotiated contracts?

A Can you give me that once again? In negotiated contracts?

Q Right. What methodology is employed by Bristol Laboratories in establishing prices to be charged to the government under negotiated contracts?

MR. ENDRIES: Are you using the term of art "negotiated" as opposed to advertised contracts?

MS. BUCHWALD: We are talking in terms of the contracts that we have in this lawsuit.

A These are bid contracts, are they not, which are not negotiated. They are bid contracts.

MR. BROSNAN: They are negotiated.

MR. ENDRIES: That's the way I look at them. We look at them—

THE WITNESS: I would understand them to be [47] bid contracts.

MR. ENDRIES: Our methodology is the same whether we are talking about responding to an advertised contract by the government or a negotiated contract by the government.

Q Just describe what that response is in methodology.

A We would look at the estimated standard cost for the product in question. We would look at historical bidding on our part and on the part of our competition, and basically these are the factors that would allow us to render a decision on what price should be bid for a given contract.

Q Are revenues from Bristol Laboratories' sales of pharmaceuticals to the government comingled with revenues from Bristol Laboratories' sales to other customers?

A Yes, they are.

Q Can Bristol Laboratories identify through its accounting system which revenues are generated from sales to the government and which revenues are generated from sales to other customers?

A Yes. It can determine the revenues from sales to government versus revenues from sales to other [48] customers.

Q Do government sales revenues cover, along with other sales revenues, all business expenses incurred during a financial reporting period?

A I think you will have to restate that.

Q Do government sales revenues cover, along with other sales revenues, all business expenses incurred during a financial reporting period?

MR. ENDRIES: Normally, yes, if they are profitable.

A If they are profitable.

Q If they are profitable." Is the clarification with the word "normally"?

A Yes.

Q Mr. Cormier, is it accurate that revenues generated from government sales contribute, along with revenues from sales to other Bristol customers, to the recovery of all costs of doing business during that period, as we have just discussed, notwithstanding the fact that these costs may or may not be identified and assigned to any particular business segment or product line or particular product?

Would you like the reporter to read that back?

[49] (Question read)

A I don't believe that we have any way of really telling, except for the fact that we received X amount of dollars in income and expenses recorded during this period, an amount for X number of dollars, and the difference either reflects a profit or a loss. I don't understand that. We can't really determine what income applies to what expenses.

Q I think you just told me a moment ago when I asked you the question, do government sales revenues cover, along with other sales revenues, all business expenses incurred during a financial period. You answered, "Normally, yes," presuming that you operated profitably. I just asked you really the same question and added the observation that some of those costs may not be identified to particular lines of business or specific products.

MR. SHERMAN: I think the second question asked if revenues generated from government contracts went toward recovering all expenses. Mr. Cormier said he has no idea which expenses government revenues went toward recovering. That was slightly different from the first ques-

tion. The answer to the first question is still yes, all other revenues cover all expenses. [50] He can't tell you, I believe, correct me if I am wrong, in the second question, whether government revenues go toward all expenses, which is, I think, the way the second question read.

MS. BUCHWALD: I think the second question noted and asked whether—

MR. SHERMAN: We can have it reread.

(Question read)

A It does include both, I am sorry.

Q So the answer then to the —

A The answer would be, normally when our total revenues exceed our total expenses for a given period.

(Short recess)

MS. BUCHWALD: Mr. Cormier, I would just like to say that we don't have any further questions for you at this time.

MR. SHERMAN: I would just like a further two-minute break, and I would just have about five minutes' worth of questions.

(Short recess)

EXAMINATION BY MR. SHERMAN:

Q Mr. Cormier, you said you first started working for Bristol Laboratories in 1974?

A March of 1975.

[51] Q 1975, I am sorry.

Are you thorougly familiar with Bristol's accounting methods and procedures currently?

A Yes, I am.

Q Are you also familiar with the methods and procedures that were used prior to the date that you were employed by Bristol?

A Yes, I am.

Q Could you just briefly tell us how you became familiar and knowledgeable to those procedures?

A I spent a good deal of time reviewing documents, reviewing procedures with the people in my organization. In essence, the accounting system at Bristol Laboratories is not very different from the accounting systems found in many manufacturing operations which I have worked with over the past twenty-five years.

Q I believe you stated earlier that in arriving at gross profit margin, that Bristol considers standard costs and royalties by product. Does it do that by type of customer?

A In a few instances we have attempted to arrive at a gross profit margin by customer group. Normally gross profit is reviewed by product.

[52] MR. SHERMAN: That's all.

MS. BUCHWALD: I have no further questions.

(Time noted: 12:50 p.m.)

Subscribed and sworn to before me this___day of___ 1976.

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[53] CERTIFICATE

STATE OF NEW YORK)
) ss
COUNTY OF NEW YORK)

I, ELIZABETH WHITTET, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That, RICHARD J. CORMIER, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of April 1976.

/s/ Elizabeth Whittel

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT.

and

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the pleadings, the affidavit of John G. Brosnan, Esq., sworn to on August 21, 1975, the affidavit of James D. Martin, sworn to on August 21, 1975, the affidavit of Paul G. Dembling, Esq., sworn to August 25, 1975, the transcript of the deposition of Bristol Laboratories by Richard Cormier and the Rule 9(g) Statement and Supplemental Rule 9(g) Statement and upon all prior proceedings had herein, the intervenor-defendant, United States of America, will renew its motion for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure awarding summary judgment to the United States for the relief prayed for in its counterclaim on the ground that there is no genuine issue as to any material fact and that the United States is entitled to judgment as a matter of law and for such other and further relief as the Court deems to be proper, before the Honorable Morris E. Lasker, on October 22, 1976 at 10:00 a.m. in the forenoon of that day in Room 2903, United States Courthouse, Foley Square, New York, New York.

Dated: New York, New York
October 1, 1976

ROBERT B. FISKE, JR.
United States Attorney for the Southern District of New York, Attorney for Defendants

By: /s/ _____
NAOMI REICE BUCHWALD
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007

TO: WEIL, GUTTMAN & DAVIS
60 East 42nd Street
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT,

and

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

SUPPLEMENTAL STATEMENT UNDER LOCAL RULE 9(g)

SUPPLEMENTAL STATEMENT OF THE MATERIAL FACTS AS TO WHICH THERE ARE NO GENUINE ISSUES

The following is a supplemental statement of the material facts as to which defendants contend there is no genuine issue to be tried.

12. As a substitute for item 11 of the Rule 9(g) Statement, dated August 28, 1976, submitted by defendants the following:

> Plaintiff assigns standard direct manufacturing costs, standard manufacturing overhead, and royalty costs to individual products.

13. No costs of plaintiff are assigned exclusively to non-government contracts.

14. Plaintiff does on occasion allocate for internal purposes advertising and promotion costs, sales and market-

ing costs and research costs to individual products.

Dated: New York, New York
October 1, 1976

ROBERT B. FISKE, JR.
United States Attorney for the Southern District of New York, Attorney for Defendants.

By: /s/ _____
NAOMI REICE BUCHWALD
Assistant United States Attorney
Office and Post Office Address:
One St. Andrew's Plaza
New York, New York 10007
Tel. No.: (212) 791-0052

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No.
75 CIV 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT,

and

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

NOTICE OF MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56, F.R.C.P

SIRS:

PLEASE TAKE NOTICE that upon the statement of material facts as to which there is no genuine issue to be tried; the affidavit of Gilbert H. Weil, dated July 22, 1975; the affidavit of Lorne C.D. Macbeth, dated September 29, 1975; the pleadings herein; defendant Staats's answers to plaintiff's first set on interrogatories; the transcript of the deposition of Bristol Laboratories by Richard J. Cormier; the memorandum in support of plaintiff's initial motion for summary judgment; the memorandum in opposition to intervenor-defendant's initial motion for summary judgment; plaintiff's supplemental statement under local Rule 9(g) and the accompanying memorandum, plaintiff will move this Court at Room 2903, United States Courthouse, Foley Square, New York, New York, on the 15th day of November, 1976, at ten o'clock in the forenoon, for an order that plaintiff is entitled to judgment as a matter of

law (1) limiting defendant Staats's access to an examination of plaintiff's books, documents, papers and records, in accordance with 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) and various contracts between plaintiff and the United States, to those records which are directly pertinent to and involve transactions related to such contracts, (2) prohibiting defendant Staats from gaining access to and conducting examination of plaintiff's books, documents, papers or records which are pertinent to and involve transactions related only to contracts other than the aforesaid contracts and (3) dismissing intervenor-defendant's counterclaim except to the extent that it properly seeks access to and examination of those of plaintiffs books, documents, papers and records which are directly pertinent to and involve transactions related to the said government contracts.

The grounds for this motion are the same as those stated in plaintiff's notice of its initial motion for summary judgment, filed with this Court.

Dated: New York, New York
November 5, 1976

YOURS, ETC.
WEIL, GUTTMAN & DAVIS
/s/By: _____
ROBERT L. SHERMAN
Attorneys for Plaintiff
60 East 42nd Street
New York, New York 10017
(212) 687-8573

TO: NAOMI REICE BUCHWALD, ESQ.
Assistant U.S. Attorney
United States Courthouse Annex
1 St. Andrew's Plaza
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 CIV 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT,

and

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

SUPPLEMENTAL STATEMENT UNDER LOCAL RULE 9(g)

SUPPLEMENTAL STATEMENT OF THE MATERIAL FACTS AS TO WHICH THERE ARE NO GENUINE ISSUES

The following is a supplemental statement of the material facts as to which plaintiff contends there is no genuine issue to be tried.

13. Plaintiff does not allocate or assign costs or expenses exclusively to government contracts.

14. Plaintiff does not allocate expenses for research and development, general and administrative or advertising and promotion.

15. For the limited purpose of use in reviewing employee compensation, plaintiff identifies some of its advertising and promotion expenses by product; however, such identification is not a factor in the negotiation with or the prices set to the government.

YOURS, ETC.
WEIL, GUTTMAN & DAVIS

/s/ _____
By: _____
ROBERT L. SHERMAN
Attorneys for Plaintiff
Office and P.O. Address
60 East 42nd Street
New York, New York 10017
(212) 687-8573

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1334 (MEL)

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY, PLAINTIFF,

-against-

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, DEFENDANT,

and

UNITED STATES OF AMERICA, INTERVENOR-DEFENDANT.

PROTECTIVE ORDER ON CONSENT

This action having been remanded to this Court by the United States Court of Appeals for the Second Circuit for consideration of plaintiff's request for a protective order and without prejudice to the appeals of the parties and the parties having agreed to the entry of a protective order, it is now hereby

ORDERED, that every book report, paper, record, and other document (all hereinafter referred to as "document") designated as confidential by Bristol Laboratories Division of Bristol-Myers Company ("Bristol") or any of its divisions or subsidiaries and provided or otherwise made available to the Comptroller General or any of his successors, agents, employees, or subordinates (all hereinafter referred to as "the Comptroller General"), and every summary thereof and extract therefrom by whomever made, and all data and information contained therein, including any accountants' work papers (all hereinafter referred to as "data") shall be held in confidence and shall not be provided or otherwise made available by the Comp-

troller General to any person or agency outside the General Accounting Office except as provided in subparagraphs (a) and (b), below. No copies of Bristol's documents shall be included in accountants' work papers without the approval of Bristol.

Any document and data referred to in the above paragraph shall be used by the Comptrollor General solely for the purpose of a contract study. Upon completion of that study, the Comptroller General shall immediately return to Bristol all documents described in that paragraph. Any data in which Bristol, any of its divisions or subsidiaries, or any product manufactured or sold by any of them are or may be directly or indirectly identified which the Comptroller General deems it necessary to retain shall be retained by the General Accounting Office and deposited with and maintained by the Comptroller General under security measures to be agreed upon the the parties. Access to such data by any person shall be permitted only upon written authorization of the Comptroller General, and as limited in the subparagraphs following next denominated (a) and (b).

(a) Any of the data referred to in the above paragraph may be published, provided to, or otherwise made available to a person or agency outside the General Accounting Office if the data are published, provided, or made available so that any direct or indirect identification of Bristol, any of its divisions or subsidiaries, or any product manufactured or sold by any of them, is not reasonably possible. Bristol shall be afforded a reasonable opportunity to examine and offer its comments regarding any data considered for release, including any report issued by the Comptroller General that includes such data, before release of the data or report.

(b) The Comptroller General may comply without regard to the limitations of this Order set forth above, with an official written request for any of the data referred to above submitted to him by either House of Congress, or any committee of the House of Representatives or the Senate, or any joint committee of the two Houses to the

extent authorized and directed by law. The Comptroller General will cause prompt notice of any such request to be given to Bristol and to this Court at least seven calendar days prior to furnishing the data requested, and it is

FURTHER ORDERED, that the Comptroller General and the United States shall notify Bristol promptly of any request for disclosure, subpoena *duces tecum*, civil action, or other order or application for an order seeking production, release, or disclosure of any data referred to above, and further agree to use their best efforts to protect the confidentiality of such data, except as provided above, including resort to appropriate judicial remedies and cooperation with Bristol in such efforts, and it is

FURTHER ORDERED, that the Court shall retain jurisdiction to interpret and enforce the terms of this order, upon application of any party.

New York, New York
Sept. 6, 1979.

/s/ _____
H. MORRIS E. LASKER
United States District Judge

CONSENTED AND AGREED TO:

WEIL, GUTTMAN & DAVIS
Attorneys for Bristol Laboratories Division of Bristol-Myers Company

By: /s/ _____
ROBERT L. SHERMAN

ROBERT B. FISKE, JR.
Attorney for Elmer B. Staats, Comptroller General of the United States and the United States of America.

BY: /s/ _____
NAOMI REICE BUCHWALD
Assistant United States Attorney

Supreme Court of the United States

No. 80-264

ELMER B. STAATS, COMPTROLLER GENERAL OF UNITED STATES, ET AL., PETITIONERS,

v.

BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS COMPANY

ORDER ALLOWING CERTIORARI. Filed December 8, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

Justice Stewart took no part in the consideration or decision of this petition.

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